No. 89-742-CFH
Status: GRANTED

Title: James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, Petitione
v.
Carroll F. Youngblood

Docketed:
November 8, 1989

Court: United States Court of Appeals for the Fifth Circuit

See also:
89-516

Counsel for petitioner: Palmer,Charles A.

Counsel for respondent: Farrar,Randy

Entry	Date	Note	Proceedings and Orders
1	Nov 8 1989	G	Petition for writ of certiorari filed.
2	Nov 15 1989	G	Motion of respondent for leave to proceed in forma pauperis filed.
3	Nov 15 1989		Brief of respondent Carroll F. Youngblood in opposition filed.
4	Nov 21 1989		DISTRIBUTED. December 8, 1989
5	Dec 4 1989		REDISTRIBUTED. December 8, 1989
6	Dec 11 1989		Motion of respondent for leave to proceed in forma pauperis GRANTED.
7	Dec 11 1989		Petition GRANTED.
			**********
8	Jan 4 1990		Record filed.
		*	Certified copy of original record and proceedings, 3 volumes, received.
10	Jan 25 1990		Brief of petitioner James A. Collins, Dir., etc. filed.
11	Jan 25 1990		Brief amicus curiae of United States filed.
9	Jan 26 1990		SET FOR ARGUMENT MONDAY, MARCH 19, 1990. (2ND CASE)
12	Feb 20 1990		Brief of respondent Carroll F. Youngblood filed.
13	Feb 26 1990		Brief amicus curiae of Wilbert Lee Evans filed.
15	Feb 26 1990	G	Motion of petitioner to dispense with printing the joi appendix filed.
14	Feb 27 1990		CIRCULATED.
16	Mar 5 1990		Motion of petitioner to dispense with printing the joi appendix GRANTED.
17	Mar 19 1990		ARGUED.

89-742

Supreme Court, U.S.
FILED
NOV 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE UNITED STATES SUPREME COURT OCTOBER TERM, 1989

JAMES A. LYNAUGH,
Petitioner,

v.

CARROLL F. YOUNGBLOOD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant
Attorney General

LOU McCREARY
Executive Assistant
Attorney General

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division

CHARLES A. PALMER*
Assistant Attorney General

S. MICHAEL BOZARTH
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

* *Counsel of Record*

48pp

QUESTIONS PRESENTED

1. Whether the retroactive application of a law that does not punish as a crime an act previously committed, which was innocent when done; that does not make more burdensome the punishment for a crime, after its commission, and that does not deprive one charged with crime of any defense available according to law at the time when the act was committed, violates the *Ex Post Facto* Clause, Article I, §10 of the United States Constitution.

2. Whether the retroactive application of a purely procedural change in the law--pursuant to which a state appellate court is allowed to reform a judgment in a criminal case to delete an unauthorized punishment--violates the *Ex Post Facto* Clause.

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No. _____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1989

JAMES A. LYNAUGH,
Petitioner,

v.

CARROLL F. YOUNGBLOOD,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES James A. Lynaugh, by and through his attorney, the Attorney General of Texas, and files this Petition for Writ of Certiorari.[1]

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit reversing the district court's denial of habeas relief is attached hereto as Appendix D. *Youngblood v. Lynaugh*, ___ F.2d ___, No. 88-2888 (5th Cir. Sept. 8, 1989). The order of the court of appeals denying the state's suggestion of rehearing *en banc* is attached as Appendix E. The opinion of the federal district court denying habeas relief is attached as Appendix C.

---

[1] For clarity, the Petitioner is referred to as "the state," and Respondent as "Youngblood."

Youngblood v. Lynaugh, No. TY-86-211-CA (E.D. Tex. Sept. 13, 1988). The opinion of the Texas Court of Criminal Appeals denying Youngblood's state habeas application is attached as Appendix B. *Ex parte Youngblood*, 698 S.W.2d 671 (Tex. Crim. App. 1985) (en banc). The order of the state convicting court recommending that habeas relief be granted is attached as Appendix A. *Ex parte Youngblood*, No. 7-81-102.

JURISDICTION

The judgment of the Court of Appeals was entered on September 8, 1989. A timely filed suggestion of rehearing *en banc* was denied on October 19, 1989. This petition for writ of certiorari is filed within 30 days after final judgment in the court below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Const. Art. I, § 10, cl. 1 provides as follows:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Tex. Code Crim. Proc. Ann. art. 37.10(b) (Vernon Supp. 1989) provides as follows:

> If the jury assessed punishment in a case and in the verdict assesses both punishment that is authorized by law for the offense and punishment that is not authorized by law for the offense, the court shall reform the verdict to show the punishment authorized by law and to omit the punishment not authorized by law. If the trial court is required to reform a verdict under this subsection and fails to do so, the appellate court shall reform the verdict as provided by this subsection.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

The state has lawful and valid custody of Youngblood pursuant to a judgment and sentence of the 7th District Court of Smith County, Texas, in Cause No. 7-81-102-A, styled *The State of Texas v. Carroll F. Youngblood*. On March 17, 1982, Youngblood was convicted on his plea of "not guilty" of the first-degree felony offense of aggravated sexual abuse. Youngblood pled "true" to a prior conviction alleged for enhancement of punishment (SF II 299),[2] and the court instructed the jury that the proper punishment was "confinement in the Texas Department of Corrections for life or for any term of years not less than fifteen (15) nor more than ninety-nine (99). In addition, you may assess a fine not to exceed $10,000.00." (Tr. 27). The jury found that Youngblood had been previously

[2]"R." refers to the federal record on appeal by page number; "SF" refers to the statement of facts of Youngblood's trial, and "Tr." refers to the transcript.

convicted of a felony and assessed punishment at life imprisonment and a fine of $10,000.00.

Youngblood's conviction was affirmed in an unpublished opinion delivered by the Twelfth District Court of Appeals of Texas on August 13, 1984. *Youngblood v. State*, No. 12-82-0050-CR. He then filed an application for state writ of habeas corpus challenging his conviction and sentence. The state convicting court, relying on *Bogany v. State*, 661 S.W.2d 957 (Tex. Crim. App. 1983) (en banc), found that Youngblood was entitled to a new trial because the judgment contained a fine which was unauthorized by state law (Appendix, hereinafter "App.," A). On October 16, 1985, the Texas Court of Criminal Appeals delivered an opinion in which it found that the fine was not authorized by law, and--acting pursuant to Article 37.10(b) of the Texas Code of Criminal Procedure, which became effective June 11, 1985--reformed the judgment to delete the fine. *Ex parte Youngblood*, 698 S.W.2d 671, 672 (Tex. Crim. App. 1985) (en banc) (App. B).

On June 23, 1986, Youngblood filed an application for writ of habeas corpus in federal district court alleging that the retroactive application of Article 37.10(b) to his case violated the *Ex Post Facto* Clause (R. 52-69). Without requiring a response from the state, the district court summarily dismissed Youngblood's federal writ (R. 51). On November 5, 1986, Youngblood filed a motion to reconsider, and the district court withdrew its previous order and set a hearing to hear arguments on the issues raised by Youngblood (ROA 28). After the hearing the state filed a motion to dismiss for failure to exhaust state remedies and an answer (R. 15-25). On September 13, 1988, the district court denied the state's exhaustion motion and also denied habeas relief, finding that the retroactive

application of Article 37.10(b) does not violate the federal constitutional prohibition against *ex post facto* laws (App. C 5-6). Youngblood appealed, and on September 8, 1989, the court of appeals reversed, concluding that there had been an *ex post facto* violation (App. D 10). On October 19, 1989, the court of appeals denied the state's suggestion of rehearing *en banc* (App. E).

B. Statement of Facts

The state presented evidence at the guilt-innocence phase of trial that Youngblood, wielding a knife, abducted a 20-year-old married woman from her home. He forced his victim to drive to a secluded spot where they parked for four hours while he fondled her and performed oral sodomy on her; Youngblood also forced his victim to perform oral sodomy on him, and he ejaculated into her mouth.

Upon returning to the victim's home, she and Youngblood were seen by the victim's husband and brother, who gave chase. The chase ended with the victim's car crashing head-first into a police car, breaking her jaw and knocking out four of her teeth. Youngblood did not testify or present any evidence.

SUMMARY OF ARGUMENT

There are special and important reasons to grant the writ. The court of appeals erred in finding that Youngblood suffered an *ex post facto* violation, and its decision is in irreconcilable conflict with the decisions of the Court of Appeals for the Fourth Circuit in *Evans v. Thompson*, 881 F.2d 117, 120-21 (4th Cir. 1989), the Arkansas Supreme Court in *Pickens v. State*, 730 S.W.2d 230, 235 (Ark.), *cert. denied*, ___U.S. ___, 108 S.Ct. 269 (1987), and the Utah Supreme Court in *State*

v. Norton, 675 P.2d 577, 585-87 (Utah 1983), *cert. denied*, 466 U.S. 942 (1984).

Further, the decision of the court below is simply an incorrect interpretation of prior decisions of this Court. The retroactive application of Article 37.10(b) did not violate any of the established tests for resolving *ex post facto* claims. The change in law wrought by the statute was purely procedural, and its application to Youngblood's case did not deprive him of any substantial right. Moreover, there was no *ex post facto* violation because Youngblood was not deprived of "fair warning" by the application of the statute to his case.

REASONS FOR GRANTING THE WRIT

I.

THERE ARE SPECIAL AND IMPORTANT REASONS TO GRANT THE WRIT.

A. Certiorari should be granted to resolve an irreconcilable conflict of authority on an important, recurring issue of constitutional law.

Rule 17 of the rules of this Court provides that a "review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." An irreconcilable conflict between decisions of two courts of appeals is a well established ground for granting certiorari, *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694, 700 (1982), as is a conflict between a court of appeals and the highest court of a state. *Lakeside v. Oregon*, 435 U.S. 333, 336 & n.3 (1978). Here, both circumstances are present, as the Fifth

Circuit has decided an important point of federal constitutional law directly in conflict with decisions of the Court of Appeals for the Fourth Circuit, the Arkansas Supreme Court and the Utah Supreme Court.

On at least three occasions courts have rejected *ex post facto* challenges to the retrospective application of procedural law changes which are indistinguishable in principle from that involved in the case at bar. *Evans v. Thompson*, 881 F.2d 117, 120-21 (4th Cir. 1989); *Pickens v. State, 730 S.W.2d* 230, 235 (Ark.), *cert. denied*, ___ U.S. ___, 108 S.Ct. 262 (1987); *State v. Norton*, 675 P.2d 577, 585-87 (Utah 1983), *cert. denied*, 466 U.S. 942 (1984). Thus, the decision of the court below, if allowed to stand, will have a deleterious impact on the administration of justice far greater than the Texas cases which it directly affects.

B. Certiorari should be granted to correct an ill reasoned and clearly erroneous interpretation of federal constitutional law.

There are two ways to view the opinion of the court below, either of which constitutes a compelling reason why the Court should exercise its certiorari jurisdiction. As discussed in Part II, *infra*, the state is convinced that the opinion of the court below is in irreconcilable conflict with numerous prior decisions of this Court construing the *Ex Post Facto* Clause. Simply put, the court of appeals erred in finding an *ex post facto* violation because the change in law which was retroactively applied to Youngblood's case was purely procedural in nature and did not punish previously innocent conduct, increase the punishment for an act previously committed or deprive Youngblood of an existing defense. Under the state's view of the case, the

Court should grant certiorari to correct a glaring error of federal constitutional law.

Two of the three judges on the panel of the court below did not join the opinion but instead filed concurring opinions. Both concurring opinions were of the view that this Court's *ex post facto* decisions are so unclear as to provide no guidance for inferior courts. As Judge Jones stated in her concurrence:

> If we are to continue to hold that "procedural" changes that do not affect the traditional *ex post facto* concerns--the definition of a proscribed or criminal act or its punishment or available defenses--nevertheless run afoul of the clause, I fear that the Supreme Court's decisions offer little guidance for distinguishing among such procedural cases. In the absence of such guidance, I can see no overriding principle from which to disagree with the majority's conclusion that *this* procedural change so substantially affected the defendant's rights as to violate the *ex post facto* clause.

(App. D 12). Judge Gee, also concurring, agreed with Judge Jones that prior precedent of this Court "constitutes more of a bright spectrum than a bright line." (App. D 10). Thus, under the view of two of the three judges who decided this case in the court below, certiorari should be granted to assist the courts of appeals and state courts of last resort in dealing with similar issues.

II.

THE RETROACTIVE APPLICATION OF ARTICLE 37.10(b) DOES NOT VIOLATE THE *EX POST FACTO* CLAUSE OF THE UNITED STATES CONSTITUTION.

On June 11, 1985, Article 37.10(b) of the Texas Code of Criminal Procedure became effective. That statute provides that when a jury verdict assesses both a punishment that is authorized by law and one that is not, the trial court shall reform the verdict, and if the trial court fails to do so, "the appellate court shall reform the verdict as provided by this subsection." Prior to the enactment of Article 37.10(b), a verdict which contained an unauthorized punishment required reversal of the conviction and an entire new trial on both guilt-innocence and punishment. *Bogany v. State*, 661 S.W.2d 957 (Tex. Crim. App. 1983) (en banc). The *Bogany* court had reasoned that an entire new trial was required because it lacked authority to change the verdict rendered by the jury. *Id.* at 959.

The first case to come before the Court of Criminal Appeals following the passage of Article 37.10(b) was *Ex parte Johnson*, 697 S.W.2d 605 (Tex. Crim. App. 1985), in which the court applied the statute to reform a verdict and judgment pronounced in 1980 in which an impermissible fine had been imposed in addition to incarceration. The *Johnson* court rejected the petitioner's *ex post facto* claim, reasoning as follows:

> Since the amendment does not constitute substantive law defining criminal acts or providing for penalties, it is procedural in nature. Thus, in the absence

> of express legislative intent to the contrary, the new law controls litigation from its effective date and applies to both pending and future actions. *See Wade v. State*, 572 S.W.2d 533 (Tex.Cr.App. 1978), and cases cited therein at 534. See also *Patterson v. State*, 650 S.W.2d 453 (Tex.App. - Houston [14th] 1982). We must therefore follow the Legislature's mandate and reform that portion of the verdict unauthorized by law.

Id. at 607-08. The Court of Criminal Appeals, relying on *Johnson*, similarly reformed the judgment in Youngblood's case. *Ex parte Youngblood*, 698 S.W.2d 671, 672 (Tex. Crim. App. 1985) (App. B 2).

A. *Retroactive application of Article 37.10(b) does not violate the* Ex Post Facto *Clause because it does not punish as a crime an act previously committed, which was innocent when done; does not make more burdensome the punishment for a crime, after its commission, and does not deprive one charged with crime of any defense available according to law at the time when the act was committed.*

The time-honored standard for judging whether retroactive application of a law is unconstitutionally *ex post facto* is set out in *Beazell v. Ohio*, 269 U.S. 167 (1925):

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done;

> which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.

Id. at 169-70, quoted in *Dobbert v. Florida*, 432 U.S. 282, 292 (1977).

The opinion of the court below did not find, nor could it, that Article 37.10(b) is constitutionally infirm under the above test. Instead, the court below applied a different analysis:

> Clearly then, determination of the question whether a statute punishes a previously innocent act, or makes more burdensome the standard of proof, or eliminates a defense that was available at the time the act was committed cannot be dispositive of the inquiry whether such a statute violated the *Ex Post Facto* clause. Once it is determined that the law in question was applied retrospectively, the salient issue becomes whether the law operated to disadvantage the accused in the exercise of a substantial right or protection that he previously enjoyed, not whether the circumstances of its application conform to a paradigmatic or illustrative category of harms.

(App. D 8). The court of appeals' reasoning is at odds with many decisions of this Court and is wholly inconsistent with the spirit of the *Ex Post Facto* Clause, as discussed below.

B. *Because the change wrought by Article 37.10(b) was purely procedural and did not deprive Youngblood of any substantial right, its retroactive application did not violate the* Ex Post Facto *Clause.*

Since *Hopt v. Utah*, 110 U.S. 574 (1884), it has been settled that the retroactive application of a purely procedural change in the law does not run afoul of the *Ex Post Facto* Clause. This is true even in cases in which the change in law works to the disadvantage of the defendant. *Dobbert*, 432 U.S. at 293; *United States v. Crabtree*, 754 F.2d 1200, 1202 (5th Cir. 1985).

While the court below acknowledged the distinction between procedural and substantive changes, it reasoned that even procedural changes can be unconstitutionally *ex post facto* if they "operate to disadvantage the accused in the exercise of a substantial right or protection that he previously enjoyed . . . ." (App. D 8). Thus, under the court of appeals' view, Youngblood is entitled to federal habeas relief because the retroactive application of Article 37.10(b) deprived him of what it found to be a "substantial right."

The reasoning which led to the court below's finding of substantiality is, at best, suspect. The opinion first expresses the view that the state law right to an entire new trial must be substantial because Article 37.10(b) was enacted to abolish it (App. D 8-9). Under this rationale, of course, any change in the law which disadvantages a defendant necessarily will lead to the conclusion that he has been deprived of a substantial right. Such circular reasoning cannot support the conclusion that prior law embraced a "substantial" right.

The opinion of the court below did not rest solely on this ground, however.

> [G]iven the universal references in the *ex post facto* jurisprudence to such concepts as "material disadvantage" and substantial "protection," we are confident that the right to have one's guilt retried before a different jury--with its attendant possibility that the outcome might be different the second time around--is comfortably encompassed within the category of rights considered "substantial."

(App. D 9).

Again, the opinion of the court of appeals paints much too broadly. One need only peruse the list of cases cited in Judge Jones' concurrence (App. D 11) to appreciate how this Court has repeatedly rejected *ex post facto* challenges to laws which operated to the material disadvantage of defendants. That the retroactive application of a law disadvantages a defendant cannot be the test as to whether any deprivation he suffered should be characterized as "substantial." *See, e.g., Beazell v. Ohio*, 269 U.S. at 171 ("[S]tatutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and insubstantial manner to his disadvantage, are not prohibited.").

More fundamentally, however, the state cannot fathom how a quirk in state law that provides for two trials--even when the first is error-free, as was Youngblood's--can properly be termed "substantial." Texas law prior to the enactment of Article 37.10(b) represented nothing more than a mere fortuity with no basis in law or logic. Any harm a defendant suffered

due to retroactive application of the statute could only be characterized as "limited and insubstantial."

Youngblood's case perfectly illustrates the hollowness of the proceedings mandated by pre-37.10(b) law. The court below found the right to a whole new trial to be substantial because "the outcome might be different the second time around . . . . " (App. D 8). Whatever validity that view might have in some other context, it has none in this case. The evidence against Youngblood was not just overwhelming--it was conclusive as to his guilt. The defense offered *no evidence*, and the record is devoid of any basis on which another jury might have reached a different result than did Youngblood's first jury. To find an *ex post facto* violation in this case "mocks the substance of the *Ex Post Facto* Clause." *Dobbert*, 432 U.S. at 297.

C. *The court of appeals incorrectly focused on whether Youngblood was deprived of an existing right by the retroactive application of Article 37.10(b) rather than whether it deprived him of a lack of notice.*

Finally, the court below attached entirely too much significance to whether prior law accorded Youngblood a "right" to an entire new trial.

> The presence or absence of an affirmative, enforceable right is not relevant, however, to the *ex post facto* prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and

> governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.

Weaver v. Graham, 450 U.S. 24, 30 (1981). To the same effect are this Court's decisions invalidating retrospective judicial decisions. *See, e.g., Marks v. United States*, 430 U.S. 188, 195 (1977) (retrospective application of pornography standards of *Miller v. California*, 413 U.S. 15 (1973), deprived petitioner of "fair warning"); *Bouie v. City of Columbia*, 378 U.S. 347, 353-55 (1964) (petitioners not given "fair warning" of unforeseen judicial construction of trespassing statute).

Here, Youngblood was put on notice at the time he decided to violate the sanctity of another citizen's home and person that his actions could result in imprisonment for life, which they did. He cannot seriously argue that he would have refrained from this conduct had he known that Article 37.10(b) would be enacted several years later and applied to his case. The retroactive application of the statute to Youngblood's case did not deprive him of fair notice of the criminal sanctions to which his unlawful conduct was subject.

CONCLUSION

For these reasons, the state respectfully requests that the petition for writ of certiorari to the Court of Appeals for the Fifth Circuit issue.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant
Attorney General

LOU McCREARY
Executive Assistant
Attorney General

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division

S. MICHAEL BOZARTH
Assistant Attorney General

CHARLES A. PALMER*
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

ATTORNEYS FOR PETITIONER

* Counsel of Record

APPENDIX A

CAUSE NO. 7-81-102

EX PARTE	)(	IN THE 7TH JUDICIAL
CARROL FRANK	)(	
YOUNGBLOOD	)(	DISTRICT COURT OF
Petitioner	)(	
	)(	SMITH COUNTY, TEXAS

NATURE AND HISTORY OF THE CASE

This is a pro se application for Writ of Habeas Corpus, post-conviction, pursuant to Art. 11.07, C.C.P. Petitioner was tried by a jury and found Guilty of Aggravated Sexual Abuse under an indictment charging him with that offense, and adding an enhancement count of a prior felony conviction. In its assessment of punishment, the jury fixed the punishment at imprisonment for life, and in addition, was assessed a fine of $10,000.00.

Petitioner pursued a direct appeal, and lost. He now collaterally attacks the judgment and sentence under which he is confined, raising a single ground for relief.

PETITIONER'S CONTENTION

Petitioner contends that his judgment and sentence is void, since no fine is authorized by Sec. 12.42, V.T.C.A. Penal Code. He relies on *Bogany v. State*, 661 S.W. /2/957. See also *Ex Parte Spaulding*, No. 69,371.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner's application and the record brings him squarely within the holdings of the Court of Criminal Appeals in both referenced cases.

2. Being bound to follow the law as enunciated by a majority of the Court of Criminal Appeals, this Court must reluctantly recommend that the writ be granted, the judgment and sentence be set aside, and Petitioner remanded to this Court for re-trial.

ORDERS OF THE COURT

The Court orders that a copy of this order be certified to the Court of Criminal Appeals for disposition and a copy forwarded to Petitioner, Carroll Frank Youngblood #288242, P.O. Box 32, Huntsville Unit, Huntsville, Texas 77348.

Dated April 2, 1985.

/S/

DISTRICT JUDGE PRESIDING

APPENDIX B

EX PARTE CARROLL FRANK YOUNGBLOOD — **Habeas Corpus Application**

NO. 69,471 — **from SMITH County**

OPINION

This is a post-conviction writ of habeas corpus brought pursuant to Art. 11.07, V.A.C.C.P. Applicant was indicted for the offense of aggravated sexual abuse, with a prior felony conviction alleged for enhancement. The jury found applicant guilty of aggravated sexual abuse and he pled "True" to the enhancement paragraph. Punishment was assessed by the jury at confinement for life in the Texas Department of Corrections and a $10,000 fine.

In his application for writ of habeas corpus, applicant contends that the jury's assessment of a $10,000 fine is unauthorized by V.T.C.A. Penal Code, § 12.24(c) and requests that the judgment and sentence be set aside and a new trial ordered, citing *Bogany v. State*, 661 S.W.2d 957 (Tex Cr. App. 1983).

Section 12.42(c), supra, provides:

> "If it be shown on the trial of a first-degree felony that the defendant has been once before convicted of any felony, on conviction he shall be punished by confinement in the Texas Department of Corrections for life, or for any term of not more than 99 years or less than 15 years."

No provision is made for assessment of a fine in addition to a term of imprisonment. Thus, the fine imposed in the case at bar was unauthorized by law.

Applicant relies on *Bogany v. State*, 661 S.W.2d 957 (Tex. Cr. App. 1983) wherein we held that a judgment containing a punishment unauthorized by law was void since the court was without authority to correct the infirmity. On June 11, 1985, however, Senate Bill 1349, Acts 69th Leg., became effective. In *Ex parte Johnson*, ___ S.W.2d ___ (Tex Cr. App. No. 69,480, delivered October 9, 1985), we interpreted this amendment to provide a vehicle by which an improper verdict could be reformed, thus correcting the infirmity present in *Bogany*, *supra*. We also held that the amendment applies to pending and future actions. *Ex parte Johnson*, slip op. at 5.

In applying *Ex parte Johnson*, *supra*, to the case at bar, the assessment of $10,000.00 fine was unauthorized. Thus, we need not remand the case for a new trial; rather, we may reform the verdict and judgment and delete the improper fine.

Applicant's request for relief is therefore denied. The judgment in Cause No. 7-81-102 of the 7th Judicial District Court of Smith County is reformed to delete the $10,000.00 fine. The Clerk of this Court shall mail a copy of this Order to the Texas Department of Corrections.

It is so ordered.

Miller, Judge

Delivered October 16, 1985

En Banc

Publish

Tom G. Davis, J., not participating.

EX PARTE CARROLL FRANK YOUNGBLOOD — **Habeas Corpus Application**

NO. 69,471 — **from SMITH County**

DISSENTING OPINION

Valid reasons why *Ex parte Johnson*, ___S.W.2d ___ (Tex Cr. App., No.69,480, delivered October 9, 1985), was wrongly decided are set forth in the several dissenting opinions therein, and to reprise them here would be redundant. Nevertheless, this proceeding presents an occasion for the Court to determine whether Article 37.10(b) may be gratuitously invoked and applied by this Court in a post conviction habeas proceeding in which a final judgment of conviction imposes a sentence based upon a *verdict of a jury* assessing punishment not authorized by law. The majority fails to address that question, so I will.

First of all, even if valid, on the face of it Article 37.10(b), V.A.C.C.P. has no application. Obviously focusing on *Bogany v. State*, 661 S.W.2d 957 (Tex. Cr. App. 1983), the amendment directs "the appellate court" to reform a jury verdict. The only occasion for an "appellate court" to have jurisdiction to do so is on direct appeal from a judgment of conviction.

In a postconviction habeas corpus proceeding this Court may *hear* a cause "as though originally presented to [it] or as an appeal," Article 11.07, § 3, V.A.C.C.P. Still, as has been often pointed out by the Court, a habeas corpus proceeding may not be used as a substitute for an appeal. *Ex parte Powell*, 558 S.W.2d 480, 481 (Tex. Cr. App. 1977). A postconviction habeas application will not lie to correct errors *qua* errors committed in the trial court. The Court does not *decide* a habeas cause in its capacity as an "appellate court."

Secondly, approaching Article 37.10, supra, from another direction, one notes that Article 11.07, V.A.C.C.P., provides that the procedure it outlines "shall be exclusive . . .," id., §3. Thus, even if Article 37.10 is retrospective in the sense erroneously imputed to it in *Ex parte Johnson*, *supra*, the procedure it purports to authorize is excluded from a habeas corpus proceeding.

Thirdly, relief available in a habeas corpus proceeding to resolve problems of the nature presented here and in *Ex parte Hernandez*, ___S.W.2d ___ (Tex. Cr. App., No. 69,381, this day decided), has been explicated by this Court in, e.g., *Ex parte Hunter*, 616 S.W.2d 626 (Tex. Cr. App. 1981) and *Ex parte Brown*, 575 S.W.2d 517 (Tex. Cr. App. 1979). As stated in *Brown*, "the proper inquiry should be who assessed punishment," for if applicant is entitled to any relief from punishment previously assessed, that which is ordered depends upon whether it had been assessed by judge or by jury. When assessed by a judge, the cause is remanded to the trial court for a hearing on punishment, *e.g.*, *Ex parte Hunter*, 616 S.W.2d 626 (Tex. Cr. App. 1981); when assessed by a jury, the cause is either dismissed if applicant has served requisite time or remanded to the trial court for a new trial, *Ex parte Brown, supra*.

Applicant is entitled to relief in this habeas corpus proceeding. Because the majority denies it, I dissent.

CLINTON, Judge

(Delivered October 16, 1985)

EN BANC
PUBLISH

Onion, P.J. & Teague, J., join

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS TYLER DIVISION

CARROLL F. YOUNGBLOOD	)	
VS.	)	CIVIL ACTION NO. TY-86-211-CA
JAMES LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS	)	

ORDER

On March 17, 1982, the petitioner Carroll F. Youngblood was convicted of aggravated sexual abuse (Tr. 25). The jury assessed punishment of life imprisonment and a fine of $10,000.00 (Tr. 30, 34-35). His conviction was affirmed on appeal on August 13, 1984. Subsequently, Youngblood filed an application for a writ of habeas corpus with the Texas Court of Criminal Appeals. Youngblood relied upon *Bogany v. State*, 661 S.W.2d 957 (Tex. Crim. App. 1983), in which the Texas Court of Criminal Appeals held that the enhancement provision, Section 12.42(c), Tex. Penal Code (West 1974), does not authorize the punishment to include a fine in addition to a prison sentence. The court in *Bogany* concluded that the jury's verdict was void at its inception, and reversed the judgment. *Bogany v. State*, 661 S.W.2d, at 959.

After *Bogany* was decided, the Texas Legislature enacted Article 37.10(b), Tex. Code Crim. Proc. (West Supp. 1988), which provides:

> If the jury assesses punishment in a case and the verdict assesses both punishment

> that is authorized by law for the offense, and punishment that is not authorized by law for the offense, the court shall reform the verdict to show the punishment authorized by law and to omit the punishment not authorized by law. If the trial court is required to reform a verdict under this subsection and fails to do so, the appellate court shall reform the verdict as provided by this subsection.

This provision became effective on June 11, 1985. On October 9, 1985, the Texas Court of Criminal Appeals announced its decision in *Ex parte Johnson*, 697 S.W.2d 605 (Tex. Crim. App. 1985), which held that Article 37.10(b) is procedural in nature and can be applied retroactively. In a dissent, Presiding Judge Onion expressed the opinion that the retroactive application of the provision violated the *Ex Post Facto* Clause. *Ex parte Johnson*, 697 S.W.2d, at 610-612. One week later, on October 16, 1985, the Texas Court of Criminal Appeals denied Youngblood's application for a writ of habeas corpus, basing its decision on *Ex parte Johnson*. As in *Johnson*, the court applied Article 37.10(b) to Youngblood's conviction, although his conviction had already become final. *Ex parte Youngblood*, 698 S.W.2d 671, 672 (Tex. Crim. App. 1985).

Youngblood now seeks a writ of habeas corpus pursuant to 28 U.S.C. §2254 from this Court. As grounds for issuance of the writ, he contends that the retroactive application of article 37.10(b) violated the *Ex Post Facto* Clause, United States Constitution, Article I, Section 10, Clause 1. The respondent contends that Youngblood has failed to exhaust his state remedies as required by 28 U.S.C. §2254(b) and (c). Specifically, the respondent argues that Youngblood has not raised his *ex post facto* argument before the

Texas Court of Criminal Appeals; therefore, his federal habeas petition is premature. Alternatively, if the Court so finds that Youngblood has satisfied the exhaustion requirement, then the respondent argues that retroactive application of Article 37.10(b) to Youngblood's case was merely procedural with no substantive effect to violate the *ex post facto* prohibition.

Exhaustion of State Remedies Question

Youngblood argues that Presiding Judge Onion's discussion of the *ex post facto* question in *ex parte Johnson* obviated the need to again raise the issue before the Texas Court of Criminal Appeals. In his dissent, Presiding Judge Onion posed the question whether Article 37.10(b) could be applied retroactively. He then quoted Article I, Section 16 of the Texas Constitution which provides:

> No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligations of contracts, shall be made.

Next Presiding Judge Onion quoted extensively from an interpretive commentary of the above-quoted state constitutional provision. That commentary defines an *ex post facto* law and notes that the Texas Constitution goes further than the United States Constitution for the former is not confined to forbidding *ex post facto* laws, but also bans any retroactive law. *Ex parte Johnson*, 697 S.W.2d, at 609-610. As stated *supra*, a majority of the Texas Court of Criminal Appeals relied upon *Johnson* to deny Youngblood's application for a writ of habeas corpus. *Ex parte Youngblood*, 698 S.W.2d, at 672. Judge Clinton, joined by Presiding Judge Onion and Judge Teague, stated in a dissent that, for the reasons set forth in the dissenting opinion in *Johnson*, *Johnson* was wrongly decided. *Ex parte*

Youngblood, 698 S.W.2d, at 672. One of those reasons, of course, included Presiding Judge Onion's discussion of *ex post facto* problem encountered when applying Article 37.10(b) retroactively.

After thoroughly reviewing Youngblood's state application for a writ of habeas corpus, the Court finds that he did not specifically raise the *ex post facto* issue before the Texas Court of Criminal Appeals. However, his failure to do so does not bar him from the federal courthouse. Federal habeas petitioners need not exhaust state remedies where it is plain that to resort to the state courts would be futile. *United States ex rel. Reis v. Wainwright*, 525 F.2d 1269, 1272 (5th Cir. 1976). Here a majority of the Texas Court of Criminal Appeals has twice rejected Presiding Judge Onion's position that retroactive application of Article 37.10(b) constitutes a prohibited *ex post facto* law. *See United States ex rel. Reis v. Wainwright*, 525 F.2d, at 1272. *See also Gartrell v. Lynaugh*, 833 F.2d 527, 528-529 (5th Cir. 1987). There is nothing in this Court's review of prevailing state law to indicate that the Texas Court of Criminal Appeals will retreat from its *Johnson* and *Youngblood* decisions by adopting Presiding Judge Onion's dissent. Having found that Youngblood is excused from the exhaustion requirement, the Court shall consider the issue of whether the Texas Court of Criminal Appeals' retroactive application of Article 37.10(b) violated the federal constitutional prohibition of *ex post facto* laws.

Ex Post Facto Law Question

Article I, Section 10, Clause 1 of the United States Constitution provides that no State shall pass any *ex post facto* law. An *ex post facto* law (1) makes an action completed before the passing of the law, criminal, and punishes such action; (2) aggravates a crime, or makes it greater than it was, when

committed; (3) changes the punishment and inflicts a greater punishment, than the law annexed to the crime, when committed; or (4) alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender. *Miller v. Florida*, ___U.S.___, 107 S.Ct. 2446, 2450 (1987). For a criminal law to be *ex post facto*, it must (1) be retroactive (*i.e.*, apply to events occurring before its enactment) and (2) disadvantage the offender affected by it.. *Miller v. Florida*, ___U.S., at ___, 107 S.Ct., at 2451. Although a law may operate to the offender's detriment, no *ex post facto* violation occurs if the change in the law is merely procedural and does not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt. However, a change in the law that alters a substantive right can be *ex post facto* even if the statute takes a seemingly procedural form. *Miller v. Florida*, ___ U.S., at ___, 107 S.Ct., at 2452-2453. *See Weaver v. Graham*, 450 U.S. 24, 30-31, 101 S.Ct. 960, 965 (1981). Moreover, an unforeseeable judicial enlargement of a criminal statute, applied retroactively may operate as an *ex post facto* law. *Bouie v. City of Columbia*, 378 U.S. 347, 353-354, 84 S.Ct. 1697, 1702-1703 (1964).

It is readily apparent that the Texas Court of Criminal Appeals' application of Article 37.10(b) here was retroactive and disadvantaged Youngblood. Under the law effective at the time his conviction became final, he would have been entitled to a new trial because the jury assessed an unauthorized punishment. However, with the new statute, enacted and applied to his case after his conviction became final, the unauthorized punishment was simply stricken. Although the application of Article 37.10(b) to Youngblood's case appears to satisfy the test for an *ex post facto* law, the retroactive application, however,

does not criminalize and punish a prior action, aggravate a crime when committed, inflict a greater punishment, nor alter the legal rules of evidence. Thus, the retroactive application of Article 37.10(b) does not fall within the classic definition of an *ex post facto* law.

Due to a procedural change, Youngblood lost an entitlement to a new trial. His punishment, however, was not increased (but actually decreased), and the elements of the offense or the ultimate facts necessary to establish guilt were not changed. The Texas Court of Criminal Appeals' retroactive application of Article 37.10(b) does not transgress the federal constitutional prohibition against *ex post facto* laws. It is therefore ORDERED that Youngblood's petition for a writ of habeas corpus be DENIED and his case be DISMISSED.

SIGNED this 13th day of September, 1988.

/s/

ROBERT M. PARKER
UNITED STATES DISTRICT JUDGE

APPENDIX D

CARROLL F. YOUNGBLOOD
Petitioner - Appellant

v.

JAMES A. LYNAUGH, Director,
Texas Department of Corrections
Respondent - Appellee

No. 88-2888

United States Fifth Court of Appeals,
Fifth Circuit

Sept. 8, 1989

Prisoner applied for writ of habeas corpus, contending that the *ex post facto* clause of the Federal Constitution was violated by application against him of a statute which allows an appellate court to reform an unauthorized verdict without the necessity of remanding for retrial. The United States District Court for the Eastern District of Texas, Robert M. Parker, J., denied this writ, and prisoner appealed. The Court of Appeals, Garza, Circuit Judge, held that: (1) prisoner was not required to pursue the issue further in state-court proceedings, and (2) as applied against prisoner, the statute was *ex post facto*.

Reversed and remanded.

Gee, Circuit Judge, issued a concurring opinion.

Edith H. Jones, Circuit Judge, issued a concurring opinion.

Before GEE, GARZA, AND JONES, Circuit Judges.

GARZA, Circuit Judge:

This case presents a novel question in the Fifth Circuit under the *Ex Post Facto* clause of the United States Constitution. We are convinced that article 37.10(b) of the Tex. Code Crim. Proc., as applied to petitioner Youngblood under the circumstances of this case, violates the *Ex Post Facto* clause. We therefore REVERSE the district court's decision denying appellant's writ of habeas corpus and REMAND the case for a new trial.

BACKGROUND

On March 17, 1982, appellant Carroll Youngblood was convicted by a Texas jury of aggravated sexual abuse. He was sentenced to life imprisonment and a fine of $10,000. His conviction was affirmed on appeal. Subsequently, he filed an application for a writ of habeas corpus with the Texas Court of Criminal Appeals, relying upon *Bogany v. State*, 661 S.W.2d 957 (Tex. Crim. App. 1983)(en banc). In *Bogany*, the Texas Court of Criminal Appeals held that the sentence enhancement provision, section 12.42(c) Tex. Penal Code, does not authorize punishment to include a fine in addition to a prison sentence. The *Bogany* court concluded that the jury's verdict was void at its inception. It reversed the judgment and ordered a new trial.

In response to the *Bogany* decision, the Texas Legislature enacted article 37.10(b), Tex. Code Crim. Proc., which permits reformation of a verdict to omit any punishment not authorized by law. Article 37.10(b) eliminates the need to retry a convicted defendant.

This provision went into effect on June 11, 1985. On October 9, 1985, the Texas Court of Criminal Appeals announced its decision in *Ex parte Johnson*, 697 S.W.2d 605 (Tex. Crim. App. 1985)(en banc), which held that article 37.10(b) is procedural in nature and can be applied retroactively. In dissent, presiding Judge Onion of the Texas Court of Criminal Appeals argued that the retroactive application of article 37.10(b) violated the *Ex Post Facto* clause. One week later, on June 16, 1985, the Texas Court of Criminal Appeals denied Youngblood's application for writ of habeas corpus and, relying upon *Johnson*, applied article 37.10(b) to Youngblood's conviction, thereby deleting the unauthorized fine assessed by the jury.

Youngblood then filed a writ of habeas corpus petition in federal district court contending that the retroactive application of article 37.10(b) violated the *Ex Post Facto* clause of the United States Constitution. The district court dismissed Youngblood's petition. He now appeals from that dismissal.

DISCUSSION

Exhaustion of State Remedies.

[1] The government argues that Youngblood's petition should be denied because he has never presented his federal *ex post facto* claim before a state tribunal in post-conviction proceedings. The district court concluded that forcing appellant to resort to post-conviction proceedings before the Texas Court of Criminal Appeals would be futile. We agree.

The Texas Court of Criminal Appeals decided *Ex parte Johnson* in October of 1985. In that case, the court concluded that art. 37.10(b) was purely procedural and might properly be applied to reform an

unauthorized verdict in cases that were pending at the time of the statute's passage. Also in that case, presiding Judge Onion argued in dissent that retroactive application of art. 37.10(b) violates the *Ex Post Facto* clause. One week after the decision in *Johnson*, the Texas Court of Criminal Appeals relied upon the same reasoning to deny Youngblood's state habeas petition. *Ex parte Youngblood*, 698 S.W.2d 671 (Tex. Crim. App. 1985). Thus, it is clear that the *ex post facto* argument urged by Youngblood has been presented to, and rejected by, the Texas Court of Criminal Appeals. The district court was correct to conclude that it would be futile to require Youngblood to pursue this issue in state-court proceedings.

The Ex Post Facto Clause.

Nine years after the adoption of the United States Constitution, the Supreme Court had occasion to consider the meaning of the words *ex post facto* as used in Art. I, § 9, cl. 3 and Art. I, §10, cl. 1. In *Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648 (1798), the Court concluded that an *ex post facto* law is any provision that renders criminal "an action done before the passing of the law and which was innocent when done," or that "makes a crime greater than it was, when committed," or that "inflicts a greater punishment, than the law annexed to the crime, when committed," or that "alters the legal rules of evidence." *Id.*, 3 Dall. at 390.

More recently, the Supreme Court has stated that two critical elements must be present for a law to fall within the *ex post facto* prohibition. First, it " 'must be retrospective, that is, it must apply to events occurring before its enactment'; and second, 'it must disadvantage the offender affected by it.'" *Miller v. Florida*, 482 U.S. 423, 430, 107 S. Ct. 2446, 2451, 96

L.Ed.2d 351 (1987) (quoting *Weaver v. Graham*, 450 U.S. 24, 29, 101 S. Ct. 960, 964, 67 L.Ed.2d 17 (1981)). The Court also noted that a law which merely changes "modes of procedure" will not violate the *Ex Post Facto* clause unless it also alters "substantial personal rights" of the accused. *Miller*, 482 U.S. at 430, 107 S.Ct. at 2451 (citing *Dobbert v. Florida*, 432 U.S. 282, 97 S. Ct. 2290, 53 L.Ed.2d 344 (1977)). It is uncontroverted that the Texas Court of Criminal Appeals, and the district court below, approved the application of art. 37.10(b) to events that occurred in Youngblood's case before the enactment of the statute. The decision in this case turns upon whether the application of 37.10(b) worked to the disadvantage of the defendant.

At the time Youngblood was convicted, the jury rendered a verdict that was unauthorized by law; it assessed a term of years imprisonment in addition to a $10,000 fine. Also at the time of conviction, assessment of an unauthorized fine rendered the verdict void *ab initio* under Texas law and entitled the defendant to a new trial. Subsequent to Youngbloood's conviction, the Texas legislature passed art. 37.10(b), which allowed an appellate court to reform an unauthorized verdict of the type assessed against Youngblood without the necessity of remanding for retrial. The Texas Court of Criminal Appeals then declared, in *Ex parte Johnson*, 697 S.W.2d 605, 607 (Tex.Cr.App. 1985)(en banc) that art. 37.10(b) could be applied retroactively, to previously void verdicts. The majority concluded that, since the statute "does not constitute substantive law defining criminal acts or providing for penalties, it is procedural in nature." Thus, according to the court, the statute may be applied to pending as well as future cases.

The government urges that "it cannot be argued" that art. 37.10(b) effects substantive changes in the law

when the highest state court yet to consider the question has declared it purely procedural. However, the government misapprehends the authority of this Court to decide whether the retrospective application of a state criminal statute violates the *Ex Post Facto* clause. Whether the standard of punishment established by a later state statute is more onerous than, or worsens the conditions imposed by, its predecessor, is a uniquely federal question which will be determined by the federal courts themselves. *Weaver v. Graham*, 450 U.S. 24, 33, 101 S.Ct. 960, 966, 67 L.Ed.2d 17 (1981); *Lindsey v. Washington*, 301 U.S. 397, 400, 57 S.Ct. 797, 798, 81 L.Ed. 1182 (1937).

The state court's analysis of art. 37.10(b), as applied to Youngblood and others similarly situated, is faulty to the extent that it terminates one step short of a complete examination. In precedents dating back more than a century, the Supreme Court has held that statutes regulating procedure will violate the *Ex Post Facto* clause if they deprive the defendant of a "substantial right given to him by the law in force at the time to which his guilt relates." *Thompson v. Utah*, 170 U.S. 343, 352, 18 S. Ct. 620, 623, 42 L.Ed. 1061 (1897). Procedural statutes must "leave untouched all the substantial protections with which existing law surrounds the person accused of crime." *Id.*, citing *Duncan v. Missouri*, 152 U.S. 377, 382, 14 S.Ct. 570, 572, 38 L. Ed.485 (1894).

Thus, we may accept the state court's characterization of 37.10(b) as procedural and still disagree with its conclusion in *Ex Parte Johnson* that the statute's application in these circumstances suffers from no *ex post facto* infirmity. The question is whether Youngblood's right to retrial, to which he was entitled before the passage of art. 37.10(b), was a "substantial

protection" within the meaning of the Supreme Court's *ex post facto* jurisprudence.

The government argues that the retroactive application of art. 37.10(b) cannot offend the *Ex Post Facto* clause because it does not punish as a crime a previously innocent act, or make more burdensome the punishment of a crime after its commission or deprive the defendant of a defense available at the time the act was committed. Likewise, the authorities appended to the government's brief erroneously suggest that a statute must fit neatly within the confines of one of these enumerated pigeon holes or else it may not rightly be said to violate the *Ex Post Facto* clause.

These authorities fail to consider the import of *Thompson v. Utah, supra*, wherein the Supreme Court held that a law which authorized a jury of only eight persons, instead of twelve, to pass upon the guilt of the defendant, when applied retroactively, violated the *Ex Post Facto* clause. In that case, there was no punishment of a previously innocent act, there was no change in the burden of proof required to establish guilt and there was no elimination of a previously available defense. The focus in *Thompson v. Utah* was upon whether retrospective deprivation of the right to trial before a jury composed of twelve persons rather than eight materially altered the position of the defendant to his disadvantage.[1]

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[1]We recognize that, in *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), the Supreme Court set aside the requirement implicitly established in *Thompson v. Utah* that deliberation by a twelve-member jury is a constitutional prerequisite to a finding of guilt. This revision of one of the issues in *Thompson v. Utah*, however, left intact the proposition for which we cite that case: an *ex post facto* violation may occur in the absence of an increase in punishment, or a change in the burden of proof or an elimination of a previously available defense.

[2] In two other early cases, the Supreme Court instructed that a statute need not relate to a crime, or inflict a punishment, in the judicial sense, for the commission of past crimes, in order to constitute an *ex post facto* law. In *Cummings v. The State of Missouri*, 4 Wall. 377, 18 L.Ed. 356 (1866), the Court held that the exclusion of a minister from the exercise of his clerical function unless he agreed to take an oath that he had not engaged in or encouraged armed aggression against the United States government was an *ex post facto* law. Similarly, in *Ex parte Garland*, 4 Wall. 333, 18 L.Ed. 366 (1866), the Court found that the exclusion of a lawyer from practice for his refusal to take the oath described in *Cummings, supra*, was *ex post facto*. Clearly then, determination of the question whether a statute punishes a previously innocent act, or makes more burdensome the standard of proof, or eliminates a defense that was available at the time the act was committed cannot be dispositive of the inquiry whether such a statute violated the *Ex Post Facto* clause. Once it is determined that the law in question was applied retrospectively, the salient issue becomes whether the law operated to disadvantage the accused in the exercise of a substantial right or protection that he previously enjoyed, not whether the circumstances of its application conform to a paradigmatic or illustrative category of harms.

[3] At the time of Youngblood's conviction, it was the law of Texas that a verdict of the type rendered in this case was void *ab initio* and its imposition entitled the accused to a new trial. That right, with its attendant possibility that a second jury just might acquit the defendant, was apparently considered sufficiently "substantial" to provoke the Texas legislature to enact art. 13.10(b), authorizing an appellate court to reform the verdict and thereby deprive the defendant of the right to retrial. In any

event, whether or not the Texas legislature perceived the *Bogany* right to be substantial, we conclude that it was.

Prior Texas law made it impossible to deprive defendants such as Youngblood of their liberty without affording them a new trial. Whether or not it is a wise policy to provide that level of protection against unauthorized verdicts, it cannot be gainsaid, in our opinion, that the subsequent elimination of that right worked to appellant's disadvantage.[2] Delineation of the boundary between "substantial" rights and those considered not substantial, like the distinction between fundamental and non-fundamental rights, is an inquiry not susceptible of examination by scientific formulae or comprehensive enumeration. However, given the universal references in the *ex post facto* jurisprudence to such concepts as "material disadvantage" and substantial "protection," we are confident that the right to have one's guilt retried before a different jury--with its attendant possibility that the outcome might be different the second time around--is comfortably encompassed within the category of rights considered "substantial."

Appellant was sentenced under a procedure that was not authorized by Texas law at the time of the

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[2]We find understandable the Texas legislature's distaste for a rule of law that affords convicted criminal defendants a "second bite at the apple." Given the vicissitudes of a criminal trial before a jury, such a second chance bestows a considerable benefit upon a defendant at the same time that it imposes an unnecessary burden upon the state. In that regard, article 37.10(b) may well effect wise public policy. However, we may not allow consideration of public policy to interfere with the central inquiry before us: whether the retroactive application of art. 37.10(b) worked to the disadvantage of Youngblood in the exercise of a substantial protection.

commission of his offense. The retroactive application of art. 37.10(b) altered his right to retrial--a substantial right--to his material disadvantage. As applied to Youngblood, therefore, art. 37.10(b) is *ex post facto*. For the reasons set out above, we REVERSE the district court's decision denying appellant's writ of habeas corpus and REMAND this case for a new trial.

GEE, concurring:

Concurring entirely in the majority opinion in this very close case, I also agree with Judge Jones's observations regarding the Supreme Court's "modes of procedure" authorities such as *Thompson v. Utah*. Their present state constitutes more of a bright spectrum than a bright line.

EDITH H. JONES, concurring.

I concur with the majority opinion because, for *ex post facto* purposes, I cannot perceive a meaningful distinction between *Thompson v. Utah*, 170 U.S. 343, 18 S.Ct. 620, 42L.Ed. 1061 (1897), and this case. *Thompson* acknowledged that "mere modes of procedure" are not within the ken of the *ex post facto* clause, but it proceeded to hold that the right to be tried by twelve jurors "was regarded, at the time of the adoption of the Constitution, as vital for the protection of life and liberty," and was enjoyed by the defendant at the time he committed the offense charge. 170 U.S. at 352, 18 S.Ct. at 623. Consequently, Utah's "procedural" change to permit criminal trials before eight jurors was held to operate *ex post facto* to deprive the defendant of this substantial right.

I suggest, however, that the distinction between "mere modes of procedure" and substantial or vital procedural protections is a wobbly one under current

Supreme Court jurisprudence. One other early case seems squarely to hold that a procedural change in state law violated the *ex post facto* clause. *Kring v. Missouri*, 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed. 506 (1882) (change in the law applicable to guilty pleas, which exposed defendant to conviction for a more serious crime, and operated retroactively, violated *ex post facto* clause). A number of other decisions have found no *ex post facto* violation in retroactive "procedural" changes. *See Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977) (change in role of Florida juries in death penalty cases); *Beazell v. Ohio*, 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216 (1925) (defendant forced to undergo joint rather than separate trial for crime); *Mallett v. North Carolina*, 181 U.S. 589, 21 S.Ct. 730, 45 L.Ed. 1015 (1901) (state allowed to appeal from intermediate court's award of new trial to defendant); *Thompson v. Missouri*, 171 U.S. 380, 18 S.Ct. 922, 43 L.Ed. 204 (1898) (prior to second trial, law was changed to make circumstantial evidence admissible against the defendant and he was convicted); *Gibson v. Mississippi*, 162 U.S. 565, 16 S.Ct. 904, 40 L.Ed. 1075 (1896) (change in juror qualifications); *Hopt v. Utah*, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884) (change to allow convicted felon to testify as a witness against defendant).

There is little doubt that the defendant in several of these later cases was materially disadvantaged by the changes in criminal procedure which occurred after the commission of his offense. Consider the significance to a defendant of the right to a separate rather than joint trial with co-defendants, (*Beazell*) or of prohibiting testimony of a convicted felon (*Hopt*) or circumstantial evidence (*Thompson*) against a defendant, to say nothing of prohibiting the state's appeal from the grant of a new trial to the defendant

(*Mollett*). The Court emphasized however, in *Dobbert*, that:

> Even though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto*.

432 U.S. at 294, 97 S.Ct. at 2298.

If we are to continue to hold that "procedural" changes that do not affect the traditional *ex post facto* concerns--the definition of a proscribed or criminal act or its punishment or available defenses[1]--nevertheless run afoul of the clause, I fear that the Supreme Court's decisions offer little guidance for distinguishing among such procedural cases. In the absence of such guidance, I can see no overriding principle from which to disagree with the majority's conclusion that *this* procedural change so substantially affected the defendant's rights as to violate the *ex post facto* clause.

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[1] In *Beazell v. Ohio*, 269 U.S. 167, 169-70, 46 S.Ct. 68, 68, 70 L.Ed. 216 (1925), Mr. Justice Stone summarized the characteristics of an *ex post facto* law:

"It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*."

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 88-2888

CARROLL F. YOUNGBLOOD,
Petitioner-Appellant,

versus

JAMES A. LYNAUGH, Director
Texas Department of Corrections,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Texas

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion September 8, 5 Cir., 1989, __F.2d__)
(October 19, 1989)

Before GEE, GARZA and JONES, Circuit Judges.

PER CURIAM:

(✔) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate

Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/

United States Circuit Judge

ORIGINAL

(5)

Supreme Court, U.S.
FILED
NOV 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-742

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1989

JAMES A. LYNAUGH,

Petitioner

v.

CARROLL F. YOUNGBLOOD,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

Jon R. "Randy" Farrar
Administrator, Inmate Legal Services

Staff Counsel for Inmates
Texas Department of Criminal Justice
Institutional Division
P. O. Box 99
Huntsville, Texas 77342-0099
(409)294-2363

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(9)

33 pp

QUESTION PRESENTED

Whether the retrospective application of a procedural change in the law, which alters an accused's "substantial personal rights," violates the Ex Post Facto Clause, Article I, §10 of the United States Constitution.

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NO. 89-742

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1989

JAMES A. LYNAUGH,

Petitioner

v.

CARROLL F. YOUNGBLOOD,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Carroll F. Youngblood, Respondent, by and through his attorney, Jon R. "Randy" Farrar, and files this Brief in Opposition to James A. Lynaugh's Petition for Writ of Certiorari.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, wherein the Respondent was granted relief, is attached as Appendix A. Youngblood v. Lynaugh, 882 F.2d 956 (5th Cir. 1989). The order of the court of appeals denying the state's suggestion of rehearing en banc is attached as Appendix B. The opinion of the federal district court is attached as Appendix C. The opinion of the Texas Court of Criminal Appeals denying Respondent's application for a writ of habeas corpus is attached as Appendix D. Ex parte Youngblood, 698 S.W.2d 671 (Tex. Crim. App. 1985)(en banc).

JURISDICTION

The judgment of the Court of Appeals was entered on September 8, 1989. Petitioner's suggestion for rehearing en banc was denied on October 19, 1989.

The petition for writ of certiorari was timely filed invoking the jurisdiction of this Court under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Const. Art. I., §10, cl. 1 provides as follows:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Tex. Code Crim. Proc. Ann. art. 37.10(b)(Vernon Supp. 1985) provides as follows:

> If the jury assesses punishment in a case and in the verdict assesses both punishment that is authorized by law for the offense and that is not authorized by law for the offense, the court shall reform the verdict to show the punishment authorized by law and to omit the punishment not authorized by law. If the trial court is required to reform a verdict under this subsection and fails to do so, the appellate court shall reform the verdict as provided by this subsection.

STATEMENT OF THE CASE

On March 17, 1982, Respondent was convicted of Aggravated Sexual Abuse, a first degree felony. During the punishment phase of the trial, the jury found that Respondent had been previously convicted of a felony; consequently, Respondent's punishment was enhanced and he was sentenced to life in prison and a fine of $10,000. The Twelfth Supreme Judicial District Court of Appeals, in Tyler, Texas, affirmed the conviction on August 13, 1984. Respondent did not appeal the conviction further. Note that the conviction became final before the effective date of Tex. Code Crim. Proc. Ann. art. 37.10(b), which was on June 11, 1985.

On September 19, 1984, Respondent filed an application for a writ of habeas corpus pursuant to a decision by the Texas Court of Criminal Appeals in Bogany v. State, 661 S.W.2d 957 (Tex. Crim. App. 1983). The Court in Bogany held that the enhancement provision of Tex. Penal Code §12.42(c)(Vernon Supp. 1979) does not authorize the punishment to include a fine in addition to a prison sentence. The Court concluded that the jury's verdict, therefore, was "void at its inception" and the judgment was reversed. In light of Bogany, Respondent had legal precedence for a meritorious writ of habeas corpus and a reasonable expectation that his conviction would be reversed. The trial court, in its recommendation to the Court of Criminal Appeals, concluded that relief should be granted (ROA 45).

However, after Bogany was decided and after the Court of Criminal Appeals reversed several other convictions with fact situations similar to Bogany, the Texas Legislature passed Tex. Code Crim. Proc. Ann. art. 37.10(b):

> If the jury assesses punishment in a case and the verdict assesses both punishment that is authorized by law for the offense and punishment that is not authorized by law for the offense, the court shall reform the verdict to show the punishment authorized by law and to omit the punishment not authorized by law. If the trial court is required to reform a verdict under this subsection and fails to do so, the appellate court shall reform the verdict as provided by this subsection.

Again the statute went into effect on June 11, 1985. On October 8, 1985, the Texas Court of Criminal Appeals announced its decision in Ex parte Johnson, 697 S.W.2d 605 (Tex. Crim. App. 1985), which held that the new statute was merely procedural in nature and could be applied retrospectively. In dissent, Judge Onion expressed the opinion that the retroactive application of the statute had a substantive effect and violated the Ex Post Facto Clause. One week later, on October 16, 1985, the Court of Criminal Appeals denied Respondent's application for writ of habeas corpus, basing its decision on Ex parte Johnson. As in Johnson, the Court applied the new statute to Respondent's conviction even though his conviction had become final prior to the enactment of the new statute. Ex parte Youngblood, 698 S.W.2d 671 (Tex. Crim. App. 1985) (App. D). Consequently, the Respondent filed his pro se petition for a writ of habeas corpus with the United States District Court in Tyler, basing his petition on the dissent presented by Judge Onion.

The United States District Court initially issued an order summarily dismissing the application (ROA 51). Respondent consequently sought and received assistance from Staff Counsel for Inmates. Counsel filed a Motion to Reconsider (ROA 36), and, in the alternative, Notice of Appeal (ROA 29). In response, the Court withdrew its earlier order and ordered a hearing on the merits (ROA 28). The District Court issued its decision on September 13, 1988, denying Respondent's allegation that the retrospective application of Tex. Code Crim. Proc. Ann. art. 37.10(b), by the Texas Court of Criminal Appeals, violates the Ex Post Facto Clause of the Constitution (ROA 8) (App. D). Respondent again filed notice of appeal (ROA 7) and requested a certificate of probable cause (ROA 6). In response, Judge Parker issued a certificate of probable cause to the Court of Appeals (ROA 1).

The Court of Appeals for the Fifth Circuit considered the appeal and granted relief on September 8, 1989. Youngblood v. Lynaugh, 882 F.2d 956 (5th Cir. 1989) (App. A). On October 19, 1989, the Court of Appeals denied the Petitioner's suggestion for rehearing en banc (App. B).

SUMMARY OF ARGUMENT

There are no special and important reasons for granting the writ. The decision by the Court of Appeals for the Fifth Circuit simply applied the holdings heretofore announced by the Supreme Court to the facts in this case.

The State of Texas has misrepresented the law in alleging that the retrospective application of procedural laws cannot violate the Ex Post Facto Clause. This Court has a long history holding to the contrary. As recently as 1987, the Court held that a change in a procedural law can fall within the ex post facto prohibition if it alters "substantial personal rights." Miller v. Florida, 482 U.S. 423, 430, 107 S.Ct. 2446, 2451, 96 L.Ed.2d 351 (1987). See also Weaver v. Graham, 450 U.S. 24, 29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981); Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977); Thompson v. Utah, 170 U.S. 343, 352, 18 S.Ct. 620, 623, 42 L.Ed. 1061 (1897).

Furthermore, the State has ignore the standard of review heretofore announced and presently employed by this Court. Two critical elements must be present for a law to fall within the ex post facto prohibition. First, it "'must be retrospective, that is, it must apply to the events occurring before its enactment'; and second, 'it must disadvantage the offender affected by it.'" Miller, 482 U.S. at 430, 107 S.Ct. at 2451, quoting Weaver, 450 U.S., at 29, 101 S.Ct., at 964. Utilizing this standard, the Court of Appeals appropriately concluded that the retrospective application of Tex. Code Crim. Pro. Ann. art. 37.10(b) violates the Ex Post Facto Clause.

ARGUMENT AND AUTHORITIES

There are no special and important reasons for granting the writ. In presenting its case, the State of Texas has misrepresented the law on this issue. It has limited and focused its discussion to only one part of the Court's past decisions, as seen in the Petitioner's emphasis on the following excerpt from Beazell v. Ohio, 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216 (1925):

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done;

> which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.

Id. at 169-70, quoted in Dobbert v. Florida, 432 U.S. 282, 292 (1977). Petitioner implies that if a case does not fall within the parameters of this provision, an accused is not entitled to relief.

Petitioner has, however, ignored the bulk of the holdings of the Court on this issue. For example, in Beazell, the Court went on to say that "there may be procedural changes which operate to deny to the accused a defense available under the laws in force at the time of the commission of his offense, or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition." 269 U.S., at 170. The Court of Appeals characterized the State's approach as presenting case law to "erroneously suggest that a statute must fit neatly within the confines of one of these enumerated holes or else may not rightly be said to violate the Ex Post Facto clause." 882 F.2d, at 959. The State basically is misrepresenting the law to unduly limit the value of the Ex Post Facto Clauses.

The Supreme Court's past decisions on this issue clearly indicate that the value of the Ex Post Facto Clause is broad, rather than narrow. Or, as Judge Gee concluded, the possibility that a retrospective application of a procedural change in the law will violate the Ex Post Facto Clause "constitutes more of a bright spectrum than a bright line." Youngblood, 882 F.2d, at 960.

The Supreme Court first considered the prohibition against ex post facto laws in Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798). In an oft-quoted opinion, Justice Chase listed exemplary kinds of laws barred by the constitutional provision, including:

> Every law that alters the legal rules of evidence, and requires less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender. (3 U.S. 390)

The next sentence in Justice Chase's opinion is not quoted as often, but he adds that the prohibition includes all other similar kinds of laws: "All these, and similar laws, are manifestly unjust and oppressive."

The Court has, of course, specified limits on the concept. The prohibition against ex post facto laws does not extend to every change of law that "may work to the disadvantage of a defendant." It is intended instead to

secure "substantial personal rights" from retroactive deprivation. Portley v. Grossman, 444 U.S. 1311, 1312, 100 S.Ct. 714, 62 L.Ed.2d 723 (1980); Dobbert v. Florida, 432 U.S., at 293, 97 S.Ct., at 2298 (1977). No ex post facto violation occurs if the change is merely procedural. Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed.262 (1884).

On the other hand, a law that alters a substantial personal right can be ex post facto "even if the statute takes a seemingly procedural form." Weaver, 101 S.Ct., at 964; Miller, 107 S.Ct., at 2453. A procedural change in the law will come within the prohibition if the change materially disadvantages an individual. In Thompson v. Utah, supra, the Court held that a defendant cannot be retried under a new statute requiring only eight jurors, since the alleged offense was committed and first tried when applicable law guaranteed a trial by a jury of twelve.

In Weaver, supra, the Court held a Florida statute altering the availability of "gain time for good conduct" unconstitutional as an ex post facto law as applied to the petitioner whose crime was committed before the statute was enacted. The Court held once again that a law will be ex post facto if the law is retrospective and disadvantages the offender affected by it. 101 S.Ct., at 964. In this case, as in Weaver, "the provision attache[d] legal consequences to a crime before the law took effect." 101 S.Ct., at 965. Moreover, the situation of the accused has been materially altered to his disadvantage. In Weaver, the statute reduced the number of gain-time credits available to the Petitioner. In this case, the retrospective application of the art. 37.10(b) operates to deny Respondent the relief to which he was entitled, in other words, a new trial, by validating an otherwise void conviction.

The law in Texas, by comparison, also prohibits the retrospective application of procedural changes that deprives a defendant of substantial protection. In the Interpretive Commentary to the applicable Texas provision prohibiting ex post facto laws, Article I, Section 16, of the Texas Constitution (Vol. I, pp. 371, 372, Vernon's Constitution of the State of Texas, Annotated) it is written:

> Although ordinarily laws changing procedure are not within the inhibition, still if a procedural change is retroactive and results in depriving the accused of substantial protections, it is unconstitutional. Ex parte Roper, 61 [Tex] Cr.R. 68, 134 S.W. 334 (1911).

In his dissenting opinion in Ex parte Johnson, 697 S.W., at 609, Judge Onion, then presiding judge of the Texas Court of Criminal Appeals, stated that Art. 37.10(b) was an "overreaction" to Bogany. Judge Onion concluded that art. 37.10(b), when applied retroactively, clearly violated the prohibition against ex post facto legislation.

The underlying reason that "the Ex Post Facto Clauses were included in the Constitution was to assure that federal and state legislatures were restrained from enacting arbitrary and vindictive legislation." Miller, 107 S.Ct., at 2451, quoting Calder v. Bull, 3 Dall., at 389, 1 L.Ed. 648 (1798). It is clear that the purpose for the enactment of art. 37.10(b) was to arbitrarily prevent additional inmates, such as the Respondent, from obtaining a reversal, new trial and possible acquittal. The State has attempted to downplay the significance of the detrimental impact of the statute on inmates. For a convict, however, what greater substantial personal right exists than to have his conviction reversed? The purpose of the Ex Post Facto Clauses was precisely to stop the type of activity going on here and stop legislatures from changing the law and retrospectively imposing the new law on members of society to their detriment.

The Court of Appeals appropriately granted relief because the Respondent was able to show that (1) the criminal law was applied retrospectively, and (2) that he was disadvantaged by the retrospective application of the new law. Respondent was able to satisfy both prongs of the requirements set forth in Weaver and Miller, and the Court of Appeals so found. Whereas previously the Respondent, and all others similarly situated, were entitled to a reversal and retrial, the retrospective application of the new statute resulted in a mere modification of his judgment and sentence. The change in procedure materially disadvantaged Respondent by eliminating his right to a reversal and retrial and replacing it with an affirmance of his conviction. Respondent lost the substantial personal right that comes with any retrial and possible acquittal. The constitutional prohibition against ex post facto laws clearly applies in this case. The decision of the Court of Appeals accurately applies the Supreme Court's past holdings to the facts in this case. The petition for writ of certiorari should not be granted.

CONCLUSION

For these reasons, Respondent prays that the petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

Respectfully submitted,

CARROLL F. YOUNGBLOOD
Respondent

By: Randy Farrar
Jon F. "Randy" Farrar
Attorney for Respondent

Staff Counsel for Inmates
TDCJ-ID
P.O. Box 99
Huntsville, Texas 77342-0099
(409) 294-2363

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APPENDIX A

determination, if necessary, will not affect the liability of Local 350, since it remains jointly and severally liable for the full amount of the judgment as a successor or disguised continuance; a master's factual determination would only determine the amount of liability of the International and Vinall. Local 38, Local 350, the International, and Vinall are hereby ordered not to take any further action which would frustrate the collection of this judgment until it is satisfied, including transferring the membership of Local 350 or engaging in a business combination, and also including further petitions in bankruptcy, without this court's explicit approval. All orders in this case are binding on all successors, disguised continuances, and alter egos of any of the parties. Lastly, we award attorneys' fees and costs to the Board in the amount required to bring this civil contempt proceeding; the Board is ordered to submit affidavits regarding hours spent to this court for the fee determination.

The Board's petition in civil contempt is GRANTED to the extent noted above.

Carroll F. YOUNGBLOOD,
Petitioner-Appellant,

v.

James A. LYNAUGH, Director, Texas Department of Corrections,
Respondent-Appellee.

No. 88-2886.

United States Court of Appeals,
Fifth Circuit.

Sept. 8, 1989.

Prisoner applied for writ of habeas corpus, contending that the ex post facto clause of the Federal Constitution was violated by application against him of a statute which allows an appellate court to reform an unauthorized verdict without the necessity of remanding for retrial. The United States District Court for the Eastern District of Texas, Robert M. Parker, J., denied the writ, and prisoner appealed. The Court of Appeals, Garza, Circuit Judge, held that: (1) prisoner was not required to pursue the issue further in state-court proceedings, and (2) as applied against prisoner, the statute was ex post facto.

Reversed and remanded.

Gee, Circuit Judge, issued a concurring opinion.

Edith H. Jones, Circuit Judge, issued a concurring opinion.

1. Habeas Corpus ⇐408

Habeas corpus petitioner was not required to present to Texas state tribunal his claim that federal ex post facto clause was violated by application against him of statute which permits reformation of verdict to amend any punishment not authorized by law, as it would have been futile to require petitioner to pursue issue further in state-court proceedings; prisoner's ex post facto argument had been presented to, and rejected by, Texas Court of Criminal Appeals. U.S.C.A. Const. Art. 1, §§ 9, cl. 3, 10, cl. 1; Vernon's Ann.Texas C.C.P. art. 37.10(b).

2. Constitutional Law ⇐195

For purposes of ex post facto clause, once it is determined that law in question was applied retrospectively, salient issue becomes whether law operated to disadvantage accused in exercise of substantial right or protection that he previously enjoyed, not whether circumstances of application conformed to paradigmatic or illustrative category of harms. U.S.C.A. Const. Art. 1, §§ 9, cl. 3, 10, cl. 1.

3. Constitutional Law ⇐199
Criminal Law ⇐13.2

As to defendant who was sentenced under procedure that was not authorized by Texas law at time of commission of offense, retroactive application of statute which allowed appellate court to reform

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unauthorized verdict without necessity of remanding for retrial alters defendant's right to retrial—a substantial right—to his material disadvantage; thus, application of statute against defendant violated ex post facto clause of Federal Constitution. U.S. C.A. Const. Art. 1, §§ 9, cl. 3, 10, cl. 1; Vernon's Ann.Texas C.C.P. art. 37.10(b).

John R. "Randy" Farrar, Staff Counsel for Inmates, TDC, Huntsville, Tex., for petitioner-appellant.

S. Michael Bozarth, Asst. Atty. Gen., and Jim Mattox, Atty. Gen., Austin, Tex., for respondent-appellee.

Appeal from the United States District Court for the Eastern District of Texas.

Before GEE, GARZA and JONES, Circuit Judges.

GARZA, Circuit Judge:

This case presents a novel question in the Fifth Circuit under the *Ex Post Facto* clause of the United States Constitution. We are convinced that article 37.10(b) of the Tex.Code Crim.Proc., as applied to petitioner Youngblood under the circumstances of this case, violates the *Ex Post Facto* clause. We therefore REVERSE the district court's decision denying appellant's writ of habeas corpus and REMAND the case for a new trial.

BACKGROUND

On March 17, 1982, appellant Carroll Youngblood was convicted by a Texas jury of aggravated sexual abuse. He was sentenced to life imprisonment and a fine of $10,000. His conviction was affirmed on appeal. Subsequently, he filed an application for a writ of habeas corpus with the Texas Court of Criminal Appeals, relying upon *Bogany v. State*, 661 S.W.2d 957 (Tex.Crim.App.1983) (en banc). In *Bogany*, the Texas Court of Criminal Appeals held that the sentence enhancement provision, section 12.42(c) Tex.Penal Code, does not authorize punishment to include a fine in addition to a prison sentence. The *Bogany* court concluded that the jury's verdict was void ab initio [illegible] judgment and ordered a new trial.

In response to the *Bogany* decision, the Texas Legislature enacted article 37.10(b), Tex.Code Crim.Proc., which permits reformation of a verdict to omit any punishment not authorized by law. Article 37.10(b) eliminates the need to retry a convicted defendant. This provision went into effect on June 11, 1985. On October 9, 1985, the Texas Court of Criminal Appeals announced its decision in *Ex parte Johnson*, 697 S.W.2d 605 (Tex.Crim.App.1985) (en banc), which held that article 37.10(b) is procedural in nature and can be applied retroactively. In dissent, presiding Judge Onion of the Texas Court of Criminal Appeals argued that the retroactive application of article 37.10(b) violated the *Ex Post Facto* clause. One week later, on June 16, 1985, the Texas Court of Criminal Appeals denied Youngblood's application for writ of habeas corpus and, relying upon *Johnson*, applied article 37.10(b) to Youngblood's conviction, thereby deleting the unauthorized fine assessed by the jury.

Youngblood then filed a writ of habeas corpus petition in federal district court contending that the retroactive application of article 37.10(b) violated the *Ex Post Facto* clause of the United States Constitution. The district court dismissed Youngblood's petition. He now appeals from that dismissal.

Discussion

Exhaustion of State Remedies.

[1] The government argues that Youngblood's petition should be denied because he has never presented his federal *ex post facto* claim before a state tribunal in post-conviction proceedings. The district court concluded that forcing appellant to resort to post-conviction proceedings before the Texas Court of Criminal Appeals would be futile. We agree.

The Texas Court of Criminal Appeals decided *Ex parte Johnson* in October of 1985. In that case, the court concluded that art. 37.10(b) was purely procedural and might properly be applied to reform an unauthorized verdict in cases that were pending at the time of the statute's passage. Also in that case, presiding Judge Onion argued in dissent that retroactive application of art. 37.10(b) violates the *Ex Post Facto* clause. One week after the decision in *Johnson*, the Texas Court of Criminal Appeals relied upon the same reasoning to deny Youngblood's state habeas petition. *Ex parte Youngblood*, 698 S.W.2d 671 (Tex.Crim.App.1985). Thus, it is clear that the *ex post facto* argument urged by Youngblood has been presented to, and rejected by, the Texas Court of Criminal Appeals. The district court was correct to conclude that it would be futile to require Youngblood to pursue this issue further in state-court proceedings.

The Ex Post Facto Clause.

Nine years after the adoption of the United States Constitution, the Supreme Court had occasion to consider the meaning of the words *ex post facto* as used in Art. I, § 9, cl. 3 and Art. I, § 10, cl. 1. In *Calder v. Bull*, 3 Dall. 386, 1 L.Ed. 648 (1798), the Court concluded that an *ex post facto* law is any provision that renders criminal "an action done before the passing of the law and which was innocent when done," or that "makes a crime greater than it was, when committed," or that "inflicts a greater punishment, than the law annexed to the crime, when committed," or that "alters the legal rules of evidence." *Id.*, 3 Dall. at 390.

More recently, the Supreme Court has stated that two critical elements must be present for a law to fall within the *ex post facto* prohibition. First, it " 'must be retrospective, that is, it must apply to events occurring before its enactment'; and second, 'it must disadvantage the offender affected by it.' " *Miller v. Florida*, 482 U.S. 423, 430, 107 S.Ct. 2446, 2451, 96 L.Ed.2d 351 (1987) (quoting *Weaver v. Graham*, 450 U.S. 24, 29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981)). The Court also noted that a law which merely changes "modes of procedure" will not violate the *Ex Post Facto* clause unless it also alters "substantial personal rights" of the accused. *Miller*, 482 U.S. at 430, 107 S.Ct. at 2451 (citing *Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977)). It is uncontroverted that the Texas Court of Criminal Appeals, and the district court below, approved the application of art. 37.10(b) to events that occurred in Youngblood's case before the enactment of the statute. The decision in this case turns upon whether the application of 37.10(b) worked to the disadvantage of the defendant.

At the time Youngblood was convicted, the jury rendered a verdict that was unauthorized by law; it assessed a term of years imprisonment in addition to a $10,000 fine. Also at the time of conviction, assessment of an unauthorized fine rendered the verdict void *ab initio* under Texas law and entitled the defendant to a new trial. Subsequent to Youngblood's conviction, the Texas legislature passed art. 37.10(b), which allowed an appellate court to reform an unauthorized verdict of the type assessed against Youngblood without the necessity of remanding for retrial. The Texas Court of Criminal Appeals then declared, in *Ex parte Johnson*, 697 S.W.2d 605, 607 (Tex.Cr.App.1985) (en banc), that art. 37.10(b) could be applied retroactively, to previously void verdicts. The majority concluded that, since the statute "does not constitute substantive law defining criminal acts or providing for penalties, it is procedural in nature." Thus, according to the court, the statute may be applied to pending as well as future cases.

The government urges that "it cannot be argued" that art. 37.10(b) effects substantive changes in the law when the highest state court yet to consider the question has declared it purely procedural. However, the government misapprehends the authority of this Court to decide whether the retrospective application of a state criminal statute violates the *Ex Post Facto* clause. Whether the standard of punishment established by a later state statute is more onerous than, or worsens the conditions imposed by, its predecessor, is a uniquely federal question which will be determined by the federal courts themselves. *Weaver v. Graham*, 450 U.S. 24, 33, 101 S.Ct. 960, 966, 67 L.Ed.2d 17 (1981); *Lindsey v.*

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Washington, 301 U.S. 297, 400, 57 S.Ct. 797, 795, 81 L.Ed. 1182 (1937).

The state court's analysis of art. 37.10(b), as applied to Youngblood and others similarly situated, is faulty to the extent that it terminates one step short of a complete examination. In precedents dating back more than a century, the Supreme Court has held that statutes regulating procedure will violate the *Ex Post Facto* clause if they deprive the defendant of "a substantial right given to him by the law in force at the time to which his guilt relates." *Thompson v. Utah*, 170 U.S. 343, 352, 18 S.Ct. 620, 623, 42 L.Ed. 1061 (1897). Procedural statutes must "leave untouched all the substantial protections with which existing law surrounds the person accused of crime." *Id.*, citing *Duncan v. Missouri*, 152 U.S. 377, 382, 14 S.Ct. 570, 572, 38 L.Ed. 485 (1894).

Thus, we may accept the state court's characterization of 37.10(b) as procedural and still disagree with its conclusion in *Ex Parte Johnson* that the statute's application in these circumstances suffers from no *ex post facto* infirmity. The question is whether Youngblood's right to retrial, to which he was entitled before the passage of art. 37.10(b), was a "substantial protection" within the meaning of the Supreme Court's *ex post facto* jurisprudence.

The government argues that the retroactive application of art. 37.10(b) cannot offend the *Ex Post Facto* clause because it does not punish as a crime a previously innocent act, or make more burdensome the punishment of a crime after its commission or deprive the defendant of a defense available at the time the act was committed. Likewise, the authorities appended to the government's brief erroneously suggest that a statute must fit neatly within the confines of one of these enumerated pigeon holes or else it may not rightly be said to violate the *Ex Post Facto* clause.

These authorities fail to consider the import of *Thompson v. Utah*, *supra*, wherein the Supreme Court held that a law which authorized a jury of only eight persons, instead of twelve, to pass upon the guilt of the defendant, when applied retroactively, violated the *Ex Post Facto* clause. In that case, there was no punishment of a previously innocent act, there was no change in the burden of proof required to establish guilt and there was no elimination of a previously available defense. The focus in *Thompson v. Utah* was upon whether the retrospective deprivation of the right to trial before a jury composed of twelve persons rather than eight materially altered the position of the defendant to his disadvantage.[1]

[2] In two other early cases, the Supreme Court instructed that a statute need not even relate to a crime, or inflict a punishment, in the judicial sense, for the commission of past crimes, in order to constitute an *ex post facto* law. In *Cummings v. The State of Missouri*, 4 Wall. 277, 18 L.Ed. 356 (1866), the Court held that the exclusion of a minister from the exercise of his clerical function unless he agreed to take an oath that he had not engaged in or encouraged armed aggression against the United States government was an *ex post facto* law. Similarly, in *Ex parte Garland*, 4 Wall. 333, 18 L.Ed. 366 (1866), the Court found that the exclusion of a lawyer from practice for his refusal to take the oath described in *Cummings*, *supra*, was *ex post facto*. Clearly then, determination of the question whether a statute punishes a previously innocent act, or makes more burdensome the standard of proof, or eliminates a defense that was available at the time the act was committed cannot be dispositive of the inquiry whether such a statute violates the *Ex Post Facto* clause. Once it is determined that the law in question was applied retrospectively,

1. We recognize that, in *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), the Supreme Court set aside the requirement implicitly established in *Thompson v. Utah* that deliberation by a twelve-member jury is a constitutional prerequisite to a finding of guilt. This revisition of one of the issues in *Thompson v. Utah*, however, left intact the proposition for which we cite that case: an *ex post facto* violation may occur in the absence of an increase in punishment, or a change in the burden of proof or an elimination of a previously available defense.

the salient issue becomes whether the law operated to disadvantage the accused in the exercise of a substantial right or protection that he previously enjoyed, not whether the circumstances of its application conform to a paradigmatic or illustrative category of harms.

[3] At the time of Youngblood's conviction, it was the law of Texas that a verdict of the type rendered in this case was void *ab initio* and its imposition entitled the accused to a new trial. That right, with its attendant possibility that a second jury just might acquit the defendant, was apparently considered sufficiently "substantial" to provoke the Texas legislature to enact art. 37.10(b), authorizing an appellate court to reform the verdict and thereby deprive the defendant of the right to retrial. In any event, whether or not the Texas legislature perceived the *Bogany* right to be substantial, we conclude that it was.

Prior Texas law made it impossible to deprive defendants such as Youngblood of their liberty without affording them a new trial. Whether or not it is a wise policy to provide that level of protection against unauthorized verdicts, it cannot be gainsaid, in our opinion, that the subsequent elimination of that right worked to appellant's disadvantage.[2] Delineation of the boundary between "substantial" rights and those considered not substantial, like the distinction between fundamental and non-fundamental rights, is an inquiry not susceptible of examination by scientific formulae or comprehensive enumeration. However, given the universal references in the *ex post facto* jurisprudence to such concepts as "material disadvantage" and substantial "protection," we are confident that the right to have one's guilt retried before a different jury—with its attendant possibility that the outcome might be different the second time around—is comfortably encompassed within the category of rights considered "substantial."

Appellant was sentenced under a procedure that was not authorized by Texas law at the time of the commission of his offense. The retroactive application of art. 37.10(b) altered his right to retrial—a substantial right—to his material disadvantage. As applied to Youngblood, therefore, art. 37.10(b) is *ex post facto*. For the reasons set out above, we REVERSE the district court's decision denying appellant's writ of habeas corpus and REMAND this case for a new trial.

GEE, concurring:

Concurring entirely in the majority opinion in this very close case, I also agree with Judge Jones's observations regarding the Supreme Court's "modes of procedure" authorities such as *Thompson v. Utah*. Their present state constitutes more of a bright spectrum than a bright line.

EDITH H. JONES, concurring.

I concur with the majority opinion because, for *ex post facto* purposes, I cannot perceive a meaningful distinction between *Thompson v. Utah*, 170 U.S. 343, 18 S.Ct. 620, 42 L.Ed. 1061 (1897), and this case. *Thompson* acknowledged that "mere modes of procedure" are not within the ken of the *ex post facto* clause, but it proceeded to hold that the right to be tried by twelve jurors "was regarded, at the time of the adoption of the Constitution, as vital for the protection of life and liberty," and was enjoyed by the defendant at the time he committed the offense charge. 170 U.S. at 352, 18 S.Ct. at 623. Consequently, Utah's "procedural" change to permit criminal trials before eight jurors was held to operate *ex post facto* to deprive the defendant of this substantial right.

I suggest, however, that the distinction between "mere modes of procedure" and

2. We find understandable the Texas legislature's distaste for a rule of law that affords convicted criminal defendants a "second bite at the apple." Given the vicissitudes of a criminal trial before a jury, such a second chance bestows a considerable benefit upon a defendant at the same time that it imposes an unnecessary burden upon the state. In that regard, article 37.10(b) may well effect wise public policy. However, we may not allow considerations of public policy to interfere with the central inquiry before us: whether the retroactive application of art. 37.10(b) worked to the disadvantage of Youngblood in the exercise of a substantial protection.

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substantial or vital procedural protections is a wobbly one under current Supreme Court jurisprudence. One other early case seems squarely to hold that a procedural change in state law violated the *ex post facto* clause. *Kring v. Missouri*, 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed. 506 (1882) (change in the law applicable to guilty pleas, which exposed defendant to conviction for a more serious crime, and operated retroactively, violated *ex post facto* clause). A number of other decisions have found no *ex post facto* violation in retroactive "procedural" changes. *See Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977) (change in role of Florida juries in death penalty cases); *Beazell v. Ohio*, 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216 (1925) (defendant forced to undergo joint rather than separate trial for crime); *Mallett v. North Carolina*, 181 U.S. 589, 21 S.Ct. 730, 45 L.Ed. 1015 (1901) (state allowed to appeal from intermediate court's award of new trial to defendant); *Thompson v. Missouri*, 171 U.S. 380, 18 S.Ct. 922, 43 L.Ed. 204 (1898) (prior to second trial, law was changed to make circumstantial evidence admissible against defendant and he was convicted); *Gibson v. Mississippi*, 162 U.S. 565, 16 S.Ct. 904, 40 L.Ed. 1075 (1896) (change in juror qualifications); *Hopt v. Utah*, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884) (change to allow convicted felon to testify as a witness against defendant).

There is little doubt that the defendant in several of these later cases was materially disadvantaged by the changes in criminal procedure which occurred after the commission of his offense. Consider the significance to a defendant of the right to a separate rather than joint trial with co-defendants, (*Beazell*) or of prohibiting testimony of a convicted felon (*Hopt*) or circumstantial evidence (*Thompson*) against a defendant, to say nothing of prohibiting the state's appeal from the grant of a new trial to the defendant (*Mallett*). The Court emphasized, however, in *Dobbert*, that:

> Even though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto*.

432 U.S. at 294, 97 S.Ct. at 2296.

If we are to continue to hold that "procedural" changes that do not affect the traditional *ex post facto* concerns—the definition of a proscribed or criminal act or its punishment or available defenses [1]—nevertheless run afoul of the clause, I fear that the Supreme Court's decisions offer little guidance for distinguishing among such procedural cases. In the absence of such guidance, I can see no overriding principle from which to disagree with the majority's conclusion that *this* procedural change so substantially affected the defendant's rights as to violate the *ex post facto* clause.

1. In *Beazell v. Ohio*, 269 U.S. 167, 169-70, 46 S.Ct. 68, 68, 70 L.Ed. 216 (1925), Mr. Justice Stone summarized the characteristics of an *ex post facto* law:

> "It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*."

UNITED STATES of America, Plaintiff,

v.

HIBERNIA NATIONAL BANK, Defendant-Third Party Plaintiff-Appellant-Cross Appellee,

v.

Joseph M. RAULT, Jr., Third Party Defendant-Appellee-Cross Appellant.

No. 88-3406.

United States Court of Appeals, Fifth Circuit.

Sept. 8, 1989.

The United States brought action against bank and corporation which owned

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2888

U.S. COURT OF APPEALS
FILED
OCT 19 1989
GILBERT E. GANUCHEAU
CLERK

CARROLL F. YOUNGBLOOD,

Petitioner-Appellant,

versus

JAMES A. LYNAUGH, Director
Texas Departmen tof Corrections,

Respondent-Appellee.

Appeal from the United States District Court for the
Eastern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion SEPTEMBER 8, 5 Cir., 1989, ____F.2d____)

(OCTOBER 19, 1989)

Before GEE, GARZA and JONES, Circuit Judges.

PER CURIAM:

(x) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.

REHG-8

REHEARING FLD. 10/6/89

ODD 9-15-88

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SEP 14 1988
MURRAY L. HARRIS, CLERK
BY DEPUTY Louise Hewitt

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CARROLL F. YOUNGBLOOD)
)
VS.) CIVIL ACTION NO. TY-86-211-CA
)
JAMES LYNAUGH, DIRECTOR,)
TEXAS DEPARTMENT OF CORRECTIONS)

ORDER

On March 17, 1982, the petitioner Carroll F. Youngblood was convicted of aggravated sexual abuse (Tr. 25). The jury assessed punishment of life imprisonment and a fine of $10,000.00 (Tr. 30, 34-35). His conviction was affirmed on appeal on August 13, 1984. Subsequently, Youngblood filed an application for a writ of habeas corpus with the Texas Court of Criminal Appeals. Youngblood relied upon Bogany v. State, 661 S.W.2d 957 (Tex. Crim. App. 1983), in which the Texas Court of Criminal Appeals held that the enhancement provision, Section 12.42(c), Tex. Penal Code (West 1974), does not authorize the punishment to include a fine in addition to a prison sentence. The court in Bogany concluded that the jury's verdict was void at its inception, and reversed the judgment. Bogany v. State, 661 S.W.2d, at 959.

After Bogany was decided, the Texas Legisature enacted Article 37.10(b), Tex. Code Crim. Proc. (West Supp. 1988), which provides:

> If the jury assesses punishment in a case and the verdict assesses both punishment that is authorized by law for the offense, and punishment that is not authorized by law for the offense, the court shall reform the verdict to show the punishment authorized by law and to omit the punishment not authorized by law. If the trial court is required to reform a verdict

Civil ... ...
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> under this subsection and fails to do so, the appellate court shall reform the verdict as provided by this subsection.

This provision became effective on June 11, 1985. On October 9, 1985, the Texas Court of Criminal Appeals announced its decision in Ex parte Johnson, 697 S.W.2d 605 (Tex. Crim. App. 1985), which held that Article 37.10(b) is procedural in nature and can be applied retroactively. In a dissent, Presiding Judge Onion expressed the opinion that the retroactive application of the provision violated the Ex Post Facto Clause. Ex parte Johnson, 697 S.W.2d, at 610-612. One week later, on October 16, 1985, the Texas Court of Criminal Appeals denied Youngblood's application for a writ of habeas corpus, basing its decision on Ex parte Johnson. As in Johnson, the court applied Article 37.10(b) to Youngblood's conviction, although his conviction had already become final. Ex parte Youngblood, 698 S.W.2d 671, 672 (Tex. Crim. App. 1985).

Youngblood now seeks a writ of habeas corpus pursuant to 28 U.S.C. §2254 from this Court. As grounds for issuance of the writ, he contends that the retroactive application of article 37.10(b) violated the Ex Post Facto Clause, United States Constitution, Article I, Section 10, Clause 1. The respondent contends that Youngblood has failed to exhaust his state remedies as required by 28 U.S.C. §2254(b) and (c). Specifically, the respondent argues that Youngblood has not raised his ex post facto argument before the Texas Court of Criminal Appeals; therefore, his federal habeas petition is premature. Alternatively, if the Court so finds that Youngblood has

satisfied the exhaustion requirement, then the respondent argues that retroactive application of Article 37.10(b) to Youngblood's case was merely procedural with no substantive effect to violate the ex post facto prohibition.

Exhaustion of State Remedies Question

Youngblood argues that Presiding Judge Onion's discussion of the ex post facto question in Ex parte Johnson obviated the need to again raise the issue before the Texas Court of Criminal Appeals. In his dissent, Presiding Judge Onion posed the question whether Article 37.10(b) could be applied retroactively. He then quoted Article I, Section 16 of the Texas Constitution which provides:

> No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligations of contracts, shall be made.

Next Presiding Judge Onion quoted extensively from an interpretive commentary of the above-quoted state constitutional provision. That commentary defines an ex post facto law and notes that the Texas Constitution goes further than the United States Constitution for the former is not confined to forbidding ex post facto laws, but also bans any retroactive law. Ex parte Johnson, 697 S.W.2d, at 609-610. As stated supra, a majority of the Texas Court of Criminal Appeals relied upon Johnson to deny Youngblood's application for a writ of habeas corpus. Ex parte Youngblood, 698 S.W.2d, at 672. Judge Clinton, joined by Presiding Judge Onion and Judge Teague, stated in a dissent that, for the reasons set forth in tne dissenting opinion in Johnson, Johnson was wrongly decided. Ex parte Youngblood, 698 S.W.2d, at

672. One of those reasons, of course, included Presiding Judge Onion's discussion of ex post facto problem encountered when applying Article 37.10(b) retroactively.

After thoroughly reviewing Youngblood's state application for a writ of habeas corpus, the Court finds that he did not specifically raise the ex post facto issue before the Texas Court of Criminal Appeals. However, his failure to do so does not bar him from the federal courthouse. Federal habeas petitioners need not exhaust state remedies where it is plain that to resort to the state courts would be futile. United States ex rel. Reis v. Wainwright, 525 F.2d 1269, 1272 (5th Cir. 1976). Here a majority of the Texas Court of Criminal Appeals has twice rejected Presiding Judge Onion's position that retroactive application of Article 37.10(b) constitutes a prohibited ex post facto law. See United States ex rel. Reis v. Wainwright, 525 F.2d, at 1272. See also Gartrell v. Lynaugh, 833 F.2d 527, 528-529 (5th Cir. 1987). There is nothing in this Court's review of prevailing state law to indicate that the Texas Court of Criminal Appeals will retreat from its Johnson and Youngblood decisions by adopting Presiding Judge Onion's dissent. Having found that Youngblood is excused from the exhaustion requirement, the Court shall consider the issue of whether the Texas Court of Criminal Appeals' retroactive application of Article 37.10(b) violated the federal constitutional prohibition of ex post facto laws.

Ex Post Facto Law Question

Article I, Section 10, Clause 1 of the United States Constitution provides that no State shall pass any ex post facto law. An ex post facto law (1) makes an action completed before the passing of the law, criminal, and punishes such action; (2) aggravates a crime, or makes it greater than it was, when committed; (3) changes the punishment and inflicts a greater punishment, than the law annexed to the crime, when committed; or (4) alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender. Miller v. Florida, ___ U.S. ___, 107 S.Ct. 2446, 2450 (1987). For a criminal law to be ex post facto, it must (1) be retroactive (i.e., apply to events occurring before its enactment) and (2) disadvantage the offender affected by it. Miller v. Florida, ___ U.S., at ___, 107 S.Ct., at 2451. Although a law may operate to the offender's detriment, no ex post facto violation occurs if the change in the law is merely procedural and does not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt. However, a change in the law that alters a substantive right can be ex post facto even if the statute takes a seemingly procedural form. Miller v. Florida, ___ U.S., at ___, 107 S.Ct., at 2452-2453. See Weaver v. Graham, 450 U.S. 24, 30-31, 101 S.Ct. 960, 965 (1981). Moreover, an unforeseeable judicial enlargement of a criminal statute, applied retroactively

may operate as an ex post facto law. Bouie v. City of Columbia, 378 U.S. 347, 353-354, 84 S.Ct. 1697, 1702-1703 (1964).

It is readily apparent that the Texas Court of Criminal Appeals' application of Article 37.10(b) here was retroactive and disadvantaged Youngblood. Under the law effective at the time his conviction became final, he would have been entitled to a new trial because the jury assessed an unauthorized punishment. However, with the new statute, enacted and applied to his case after his conviction became final, the unauthorized punishment was simply stricken. Although the application of Article 37.10(b) to Youngblood's case appears to satisfy the test for an ex post facto law, the retroactive application, however, does not criminalize and punish a prior action, aggravate a crime when committed, inflict a greater punishment, nor alter the legal rules of evidence. Thus, the retroactive application of Article 37.10(b) does not fall within the classic definition of an ex post facto law.

Due to a procedural change, Youngblood lost an entitlement to a new trial. His punishment, however, was not increased (but actually decreased), and the elements of the offense or the ultimate facts necessary to establish guilt were not changed. The Texas Court of Criminal Appeals' retroactive application of Article 37.10(b) does not transgress the federal constitutional prohibition against ex post facto laws. It is therefore

ORDERED that Youngblood's petition for a writ of habeas corpus be DENIED and his case be DISMISSED.

SIGNED this 13th day of September, 1988.

ROBERT M. PARKER
UNITED STATES DISTRICT JUDGE

APPENDIX D

therefore void at its inception. *Moya v. State*, 681 S.W.2d 41, 42 (Tex.Cr.App.1984).

[2] This Court is without authority to reform applicant's sentence. The proper procedure is to remand for new sentencing. *Releford v. State*, 683 S.W.2d 385 (Tex.Cr.App.1984); *Ex parte Spaulding*, 687 S.W.2d 741 (Tex.Cr.App.1985). Because punishment was assessed by the court, we remand for a new punishment hearing only. *Ocker v. State*, 477 S.W.2d 288, 291 (Tex.Cr.App.1972).

The relief prayed for is granted. Applicant's sentence is hereby vacated and applicant is ordered into the custody of the Aransas County Sheriff for a new punishment hearing and sentence. A copy of this opinion shall be forwarded to the Texas Department of Corrections.

It is so ordered.

TOM G. DAVIS, J., not participating.

Ex parte Carroll Frank YOUNGBLOOD.

No. 69471.

Court of Criminal Appeals of Texas, En Banc.

Oct. 16, 1985.

Defendant was found guilty in the 7th Judicial District Court, Smith County, Donald Carroll, J., of aggravated sexual abuse, and defendant pled "true" to enhancement paragraph and was sentenced confinement for life and $10,000 fine. Defendant applied for writ of habeas corpus, contending that assessment of fine was unauthorized and requesting that judgment and sentence be set aside and new trial ordered. The Court of Criminal Appeals, Miller, J., held that the fine imposed was unauthorized, but the verdict and judgment would be reformed to delete the improper fine.

Order accordingly.

Clinton, J., dissented and filed an opinion in which Onion, P.J., and Teague, J., joined.

1. Criminal Law ⇐1215

Fine of $10,000 imposed upon defendant who was found guilty of aggravated sexual abuse and pled "true" to enhancement paragraph alleging prior felony conviction was unauthorized by law, as Penal Code § 12.42(c), governing sentence of defendant who was once before convicted of felony, does not make provision for assessment of fine in addition to term of imprisonment. V.T.C.A., Penal Code § 12.42(c).

2. Criminal Law ⇐1184(4)

Even though fine of $10,000, imposed upon defendant who was found guilty of aggravated sexual abuse and pled "true" to enhancement paragraph alleging prior felony conviction, was unauthorized, judgment was not void; rather, verdict and judgment would be reformed to delete improper fine.

Carroll Frank Youngblood, pro se.

Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION

MILLER, Judge.

This is a post-conviction writ of habeas corpus brought pursuant to Art. 11.07, V.A.C.C.P. Applicant was indicted for the offense of aggravated sexual abuse, with a prior felony conviction alleged for enhancement. The jury found applicant guilty of aggravated sexual abuse and he pled "True" to the enhancement paragraph. Punishment was assessed by the jury at confinement for life in the Texas Department of Corrections and a $10,000 fine.

[1] In his application for writ of habeas corpus, applicant contends that the jury's assessment of a $10,000 fine is unauthorized by V.T.C.A. Penal Code, § 12.42(c) and requests that the judgment and sentence be set aside and a new trial ordered, citing *Bogany v. State*, 661 S.W.2d 957 (Tex.Cr.App.1983).

Section 12.42(c), supra, provides:

> "If it be shown on the trial of a first-degree felony that the defendant has been once before convicted of any felony, on conviction he shall be punished by confinement in the Texas Department of Corrections for life, or for any term of not more than 99 years or less than 15 years."

No provision is made for assessment of a fine in addition to a term of imprisonment. Thus, the fine imposed in the case at bar was unauthorized by law.

Applicant relies on *Bogany v. State*, 661 S.W.2d 957 (Tex.Cr.App.1983) wherein we held that a judgment containing a punishment unauthorized by law was void since the court was without authority to correct the infirmity. On June 11, 1985, however, Senate Bill 1349, Acts 69th Leg., became effective. In *Ex parte Johnson*, 697 S.W.2d 605 (Tex.Cr.App.1985), we interpreted this amendment to provide a vehicle by which an improper verdict could be reformed, thus correcting the infirmity present in *Bogany*, supra. We also held that the amendment applies to pending and future actions. *Ex parte Johnson*, at 607-608.

[2] In applying *Ex parte Johnson*, supra, to the case at bar, the assessment of $10,000.00 fine was unauthorized. Thus, we need not remand the case for a new trial; rather, we may reform the verdict and judgment and delete the improper fine.

Applicant's request for relief is therefore denied. The judgment in Cause No. 7-81-402 of the 7th Judicial District Court of Smith County is reformed to delete the $10,000.00 fine. The Clerk of this Court shall mail a copy of this Order to the Texas Department of Corrections.

It is so ordered.

TOM G. DAVIS, J., not participating.

CLINTON, Judge, dissenting.

Valid reasons why *Ex parte Johnson*, 697 S.W.2d 605 (Tex.Cr.App.1985), was wrongly decided are set forth in the several dissenting opinions therein, and to reprise them here would be redundant. Nevertheless, this proceeding presents an occasion for the Court to determine whether Article 37.10(b) may be gratuitously invoked and applied by this Court in a post conviction habeas proceeding in which a final judgment of conviction imposes a sentence based upon a *verdict of a jury* assessing punishment not authorized by law. The majority fails to address that question, so I will.

First of all, even if valid, on the face of it Article 37.10(b), V.A.C.C.P. has no application. Obviously focusing on *Bogany v. State*, 661 S.W.2d 957 (Tex.Cr.App.1983), the amendment directs "the appellate court" to reform a jury verdict. The only occasion for an "appellate court" to have jurisdiction to do so is on direct appeal from a judgment of conviction.

In a postconviction habeas corpus proceeding this Court may *hear* a cause "as though originally presented to [it] or as an appeal," Article 11.07, § 3, V.A.C.C.P. Still, as has been often pointed out by the Court, a habeas corpus proceeding may not be used as a substitute for an appeal. *Ex parte Powell*, 558 S.W.2d 480, 481 (Tex.Cr.App.1977). A postconviction habeas application will not lie to correct errors *qua* errors committed in the trial court. The Court does not *decide* a habeas cause in its capacity as an "appellate court."

Secondly, approaching Article 37.10, supra, from another direction, one notes that Article 11.07, V.A.C.C.P., provides that the procedure it outlines "shall be exclusive ...," *id.*, § 3. Thus, even if Article 37.10 is retrospective in the sense erroneously imputed to it in *Ex parte Johnson*, supra,

the procedure it purports to authorize is excluded from a habeas corpus proceeding.

Thirdly, relief available in a habeas corpus proceeding to resolve problems of the nature presented here and in *Ex parte Hernandez*, 698 S.W.2d 670 (Tex.Cr.App., this day decided), has been explicated by this Court in, e.g., *Ex parte Hunter*, 616 S.W.2d 626 (Tex.Cr.App.1981) and *Ex parte Brown*, 575 S.W.2d 517 (Tex.Cr.App.1979). As stated in *Brown*, "the proper inquiry should be who assessed punishment," for if applicant is entitled to any relief from punishment previously assessed, that which is ordered depends upon whether it had been assessed by judge or by jury. When assessed by a judge the cause is remanded to the trial court for a hearing on punishment, e.g., *Ex parte Hunter*, 616 S.W.2d 626 (Tex.Cr.App.1981); when assessed by a jury, the cause is either dismissed if applicant has served requisite time or remanded to the trial court for a new trial, *Ex parte Brown*, supra.

Applicant is entitled to relief in this habeas corpus proceeding. Because the majority denies it, I dissent.

ONION, P.J. and TEAGUE, J., join.

Joseph Paul TURNER, Appellant,

v.

The STATE of Texas, Appellee.

No. 69221.

Court of Criminal Appeals of Texas, En Banc.

Oct. 30, 1985.

Following remand, 635 S.W.2d 734, defendant was convicted in the 171st Judicial District Court, El Paso County, Edwin F. Berliner, J., of capital murder, punishment was assessed at death, and defendant appealed. The Court of Criminal Appeals, 685 S.W.2d 38, affirmed. On motion for rehearing, the Court of Criminal Appeals, White, J., held that: (1) defendant waived any error regarding relevance of jailer's testimony, and (2) evidence was sufficient to support finding that defendant constituted a continuing threat to society.

Affirmed.

Clinton and Teague, JJ., dissented.

1. Homicide ⇐354

Extraneous offenses offered into evidence at punishment stage of capital murder trial do not have to involve crimes of violence to be relevant to whether defendant is a continuing threat to society. Vernon's Ann.Texas C.C.P. art. 37.071(a).

2. Homicide ⇐354

Extraneous offenses do not have to be finally adjudicated to be admissible at punishment stage of capital murder trial. Vernon's Ann.Texas C.C.P. art. 37.071(a).

3. Homicide ⇐354

It is not necessary that extraneous offenses occur prior to time of commission of alleged capital murder to be admissible at punishment stage of capital murder trial. Vernon's Ann.Texas C.C.P. art. 37.071(a).

4. Homicide ⇐354

Trial court has wide discretion under Vernon's Ann.Texas C.C.P. art. 37.071 in determining what is relevant and admissible at punishment stage of a capital murder trial; this wide discretion amounts to deciding what extraneous offenses are relevant.

5. Homicide ⇐354

Trial court's discretion to decide what extraneous offenses are relevant at punishment stage of capital murder trial extends to question of relevance of facts sought to be proved and offered into evidence. Vernon's Ann.Texas C.C.P. art. 37.071.

Supreme Court, U.S.
FILED
JAN 25 1990
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No. 89-742

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1989

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Petitioner,

v.

CARROLL F. YOUNGBLOOD,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

PETITIONER'S BRIEF

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant
Attorney General

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division

CHARLES A. PALMER*
Assistant Attorney General

S. MICHAEL BOZARTH
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

* *Counsel of Record*

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the retroactive application of a law that does not punish as a crime an act previously committed, which was innocent when done; that does not make more burdensome the punishment for a crime, after its commission, and that does not deprive one charged with crime of any defense available according to law at the time when the act was committed, violates the *Ex Post Facto* Clause, Article I, §10 of the United States Constitution.

2. Whether the retroactive application of a purely procedural change in the law--pursuant to which a state appellate court is allowed to reform a judgment in a criminal case to delete an unauthorized punishment--violates the *Ex Post Facto* Clause.

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No. 89-742

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1989

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Petitioner,

v.

CARROLL F. YOUNGBLOOD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITIONER'S BRIEF

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES James A. Collins, Petitioner, by and through his attorney, the Attorney General of Texas, and files this brief.[1]

---

[1]For clarity, the Petitioner is referred to as "the state," and Respondent as "Youngblood." The original petitioner in this case, James A. Lynaugh, has been succeeded in office and, hence, his successor, James A. Collins, is substituted pursuant to Rule 35.3 of this Court.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit reversing the district court's denial of habeas relief is attached to the petition for writ of certiorari as Appendix D. *Youngblood v. Lynaugh*, 882 F.2d 956 (5th Cir. 1989). The order of the court of appeals denying the state's suggestion of rehearing *en banc* is attached as Appendix E. The opinion of the federal district court denying habeas relief is attached as Appendix C. *Youngblood v. Lynaugh*, No. TY-86-211-CA (E.D. Tex. Sept. 13, 1988). The opinion of the Texas Court of Criminal Appeals denying Youngblood's state habeas application is attached as Appendix B. *Ex parte Youngblood*, 698 S.W.2d 671 (Tex. Crim. App. 1985) (en banc). The order of the state convicting court recommending that habeas relief be granted is attached as Appendix A. *Ex parte Youngblood*, No. 7-81-102.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Const. Art. I, §10, cl. 1 provides as follows:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Tex. Code Crim. Proc. Ann. art. 37.10(b) (Vernon Supp. 1989) provides as follows:

> If the jury assessed punishment in a case and in the verdict assesses both punishment that is authorized by law for the offense and punishment that is not authorized by law for the offense, the court shall reform the verdict to show the punishment authorized by law and to omit the punishment not authorized by law. If the trial court is required to reform a verdict under this subsection and fails to do so, the appellate court shall reform the verdict as provided by this subsection.

STATEMENT OF THE CASE

A. *Course of Proceedings and Disposition Below*

The state has lawful custody of Youngblood pursuant to a judgment and sentence of the 7th District Court of Smith County, Texas, in Cause No. 7-81-102-A, styled *The State of Texas v. Carroll F. Youngblood*. On March 17, 1982, Youngblood was convicted on his plea of "not guilty" of the first-degree felony offense of aggravated sexual abuse. Youngblood pled "true" to a prior conviction alleged for enhancement of punishment (SF II 299),[2] and the court in-

[2] "R." refers to the federal record on appeal by page number; no joint appendix was prepared in this case, and the appendices attached to the petition are referred to as "App." A, B, etc.; "SF" refers to the statement of facts of Youngblood's trial, and "Tr." refers to the transcript.

structed the jury that the proper punishment was "confinement in the Texas Department of Corrections for life or for any term of years not less than fifteen (15) nor more than ninety-nine (99). In addition, you may assess a fine not to exceed $10,000.00." (Tr. 27). The jury assessed punishment at life imprisonment and a fine of $10,000.00.

Youngblood's conviction was affirmed in an unpublished opinion delivered by the Twelfth District Court of Appeals of Texas on August 13, 1984. *Youngblood v. State,* No. 12-82-0050-CR. He then filed an application for state writ of habeas corpus challenging his conviction and sentence. The state convicting court, relying on *Bogany v. State*, 661 S.W.2d 957 (Tex. Crim. App. 1983) (en banc), found that Youngblood was entitled to a new trial because the judgment contained a fine which was unauthorized by state law (App. A).[3] On October 16, 1985, the Texas Court of Criminal Appeals delivered an opinion in which it found that the fine was not authorized by law, and--acting pursuant to Article 37.10(b) of the Texas Code of Criminal Procedure, which became effective June 11, 1985--reformed the judgment to delete the fine. *Ex parte Youngblood*, 698 S.W.2d 671, 672 (Tex. Crim. App. 1985) (en banc) (App. B).

On June 23, 1986, Youngblood filed an application for writ of habeas corpus in federal district court alleging that the retroactive application of Article

[3]Texas law at the time of *Bogany* allowed the appellate court to reform a sentence where punishment had been assessed by the court but not, as in Youngblood's case, where the jury had assessed punishment. *Hickman v. State*, 548 S.W.2d 736, 737 (Tex.Crim.App. 1977).

37.10(b) to his case violated the *Ex Post Facto* Clause (R. 52-69). Without requiring a response from the state, the district court summarily dismissed Youngblood's federal writ (R. 51). On November 5, 1986, Youngblood filed a motion to reconsider, and the district court withdrew its previous order and set a hearing to hear arguments on the issues raised by Youngblood (R. 28). After the hearing the state filed a motion to dismiss for failure to exhaust state remedies and an answer (R. 15-25). On September 13, 1988, the district court denied the state's exhaustion motion and also denied habeas relief, finding that the retroactive application of Article 37.10(b) does not violate the federal constitutional prohibition against *ex post facto* laws (App. C 5-6). Youngblood appealed, and on September 8, 1989, the court of appeals reversed, concluding that there had been an *ex post facto* violation (App. D 10). On October 19, 1989, the court of appeals denied the state's suggestion of rehearing *en banc* (App. E). On December 11, 1989, the Court granted the state's petition for writ of certiorari.

B. Statement of Facts

1. Facts Adduced at Trial

The state presented evidence at the guilt-innocence phase of trial that Youngblood, wielding a knife, abducted a 20-year-old married woman from her home (SF II 118-40). He forced his victim to drive to a secluded spot where they parked for four hours while he fondled her and performed oral sodomy on her; Youngblood also forced his victim to perform oral sodomy on him, and he ejaculated into her mouth (SF II 144-57).

Upon returning to the victim's home, she and Youngblood were seen by the victim's husband and

brother, who gave chase (SF II 159-61). The chase ended with the victim's car crashing head-first into a police car, breaking her jaw and knocking out four of her teeth (SF II 165-66). Youngblood did not testify or present any evidence (SF II 258-59).

2. Facts Giving Rise to Youngblood's Claim

On June 11, 1985, Article 37.10(b) of the Texas Code of Criminal Procedure became effective. That statute provides that when a jury verdict assesses both a punishment that is authorized by law and one that is not, the trial court shall reform the verdict, and if the trial court fails to do so, "the appellate court shall reform the verdict as provided by this subsection." Prior to the enactment of Article 37.10(b), a verdict which contained an unauthorized punishment required reversal of the conviction and an entire new trial on both guilt-innocence and punishment. *Bogany v. State*, 661 S.W.2d 957 (Tex. Crim. App. 1983) (en banc). The *Bogany* Court had reasoned that an entire new trial was required because it lacked authority to change the verdict rendered by the jury. *Id.* at 959.

The first case to come before the Court of Criminal Appeals following the passage of Article 37.10(b) was *Ex parte Johnson*, 697 S.W.2d 605 (Tex. Crim. App. 1985), in which the court applied the statute to reform a verdict and judgment pronounced in 1980 in which an impermissible fine had been imposed in addition to a term of incarceration. The *Johnson* court rejected the petitioner's *ex post facto* claim, reasoning as follows:

> Since the amendment does not constitute substantive law defining criminal acts or providing for penalties, it is procedural in nature. Thus, in the absence of express legislative intent to the contrary, the new law controls litigation from its effective date and applies to both pending and future actions. *See Wade v. State*, 572 S.W.2d 533 (Tex.Cr.App. 1978), and cases cited therein at 534. See also *Patterson v. State*, 650 S.W.2d 453 (Tex.App. - Houston [14th] 1982). We must therefore follow the Legislature's mandate and reform that portion of the verdict unauthorized by law.

Id. at 607-08. The Court of Criminal Appeals, relying on *Johnson*, similarly reformed the judgment in Youngblood's case. *Ex parte Youngblood*, 698 S.W.2d 671, 672 (Tex. Crim. App. 1985) (App. B 2).

SUMMARY OF ARGUMENT

The decision of the court below is an incorrect interpretation of prior decisions of this Court. The retroactive application of Article 37.10(b) does not violate any of the established tests for resolving *ex post facto* claims. It does not punish previously innocent conduct, increase the potential punishment after commission of the offense or deprive Youngblood of a defense. Moreover, there was no *ex post facto* violation because Youngblood was not deprived of "fair warning" by the application of the statute to his case.

There is no question that the change in law wrought by Article 37.10(b) was procedural in nature, and it cannot be earnestly contended that Youngblood

was deprived of a substantial right by its application to his case. Where, as here, the defendant receives a fair trial and the only error present affects solely the sentence, there is no "right" to a second trial.

By defining "substantial rights" as the types of harm listed in *Calder v. Bull*, 3 Dall. 386, 1 L.Ed. 648 (1798), the Court can eliminate confusion as to the distinction between procedure and substance and as to which rights are "substantial." Strict adherence to the *Calder* test will provide a readily understood standard that can be easily applied.

ARGUMENT

THE RETROACTIVE APPLICATION OF ARTICLE 37.10(b) DOES NOT VIOLATE THE *EX POST FACTO* CLAUSE OF THE UNITED STATES CONSTITUTION.

> **EX POST FACTO LAW**. A law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed. By Const. U. S. art. 1, §10, the states are forbidden to pass "any *ex post facto* law." In this connection the phrase has a much narrower meaning than its literal translation would justify . . . .

Black's Law Dictionary 520 (5th ed. 1979). The constitutional proscription against such laws serves two purposes: to prevent legislative abuses and to ensure that legislative enactments "give fair warning of

their effect and permit individuals to rely on their meaning until explicitly changed." *Miller v. Florida*, 482 U.S. 423, 429-30 (1987), quoting *Weaver v. Graham*, 450 U.S. 24, 29 (1981). As is apparent from the law dictionary definition, two critical elements must be present for a law to be unconstitutionally *ex post facto*: "[I]t must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver*, 450 U.S. at 429; *see Dobbert v. Florida*, 432 U.S. 282, 292 (1977) ("ameliorative" changes in the law do not offend the Constitution); *accord, Rooney v. North Dakota*, 196 U.S. 319, 325 (1905). Whether these two elements exist is merely the initial inquiry, however, given the more restrictive meaning of the phrase in the constitutional sense.

The characteristics of an *ex post facto* law -- the sorts of legislative abuses and deprivation of fair warning against which the clause was designed to protect -- were first recognized by the Court nearly two centuries ago in *Calder v. Bull*, 3 Dall. 386, 1 L.Ed. 648 (1798), and since have been restated many times:

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.

Beazell v. Ohio, 269 U.S. 167, 169-70 (1925), quoted in *Dobbert*, 432 U.S. at 292; *accord, Miller*, 482 U.S. at 429. Even if a law operates to a defendant's disadvantage, the clause does not restrict "legislative control of remedies and modes of procedure which do not affect matters of substance." *Dobbert*, 432 U.S. at 293, quoted in *Miller*, 482 U.S. at 433; *Hopt v. Utah*, 119 U.S. 574, 589-90 (1884). It is only when a "substantial right" is altered that the retrospective application of a procedural law change may be held *ex post facto*. *Miller*, 482 U.S. at 433, citing *Weaver*, 450 U.S. at 29 n.12.

While two of the three members of the panel of the court below that decided this case were unable to completely reconcile the Court's *ex post facto* jurisprudence,[4] it is clear that Youngblood cannot prevail under any of the Court's decisions. Moreover, an analysis of the Court's precedent on this subject reveals that -- with two exceptions, which provide no succor to Youngblood -- the cases can be read in

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[4]If we are to continue to hold that "procedural" changes that do not affect the traditional *ex post facto* concerns--the definition of a proscribed or criminal act or its punishment or available defenses--nevertheless run afoul of the clause, I fear that the Supreme Court's decisons offer little guidance for distinguishing among such procedural cases.

Jones, concurring (footnote omitted) (App. D 12).

Concurring entirely in the majority opinion in this very close case, I also agree with Judge Jones's observations regarding the Supreme Court's "modes of procedure" authorities such as *Thompson v. Utah*. Their present state constitutes more of a bright spectrum than a bright line.

Gee, concurring (App. D 10).

harmony to provide a workable test that will obviate the uncertainty experienced by the court below.

A. Retroactive application of Article 37.10(b) does not violate the Ex Post Facto *Clause because it does not punish as a crime an act previously committed, which was innocent when done; does not make more burdensome the punishment for a crime, after its commission, and does not deprive one charged with crime of any defense available according to law at the time when the act was committed.*

The opinion of the court below did not find, nor could it, that Article 37.10(b) is constitutionally infirm under the time-honored test of *Calder v. Bull*. Instead, the court below applied a different analysis:

Clearly then, determination of the question whether a statute punishes a previously innocent act, or makes more burdensome the standard of proof, or eliminates a defense that was available at the time the act was committed cannot be dispositive of the inquiry whether such a statute violated the *Ex Post Facto* clause. Once it is determined that the law in question was applied retrospectively, the salient issue becomes whether the law operated to disadvantage the accused in the exercise of a substantial right or protection that he

> previously enjoyed, not whether the circumstances of its application conform to a paradigmatic or illustrative category of harms.

(App. D 8). The Fifth Circuit's approach does not comport with prior decisions of this Court for two reasons: first, because it does not consider whether Youngblood was deprived of fair warning by application of the statute to his case and, second, because it greatly enlarges the class of rights that might properly be characterized as "substantial."

B. *The court of appeals incorrectly focused on whether Youngblood was deprived of an existing right by the retroactive application of Article 37.10(b) rather than whether it deprived him of notice.*

The initial flaw in the approach of the court below is that it attaches entirely too much significance to whether prior law accorded Youngblood a "right" to an entire new trial.

> The presence or absence of an affirmative, enforceable right is not relevant, however, to the *ex post facto* prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the

> legislature increases punishment beyond what was prescribed when the crime was consummated.

Weaver, 450 U.S. at 30; *accord, Miller*, 482 U.S. at 430. To the same effect are this Court's decisions invalidating retrospective judicial decisions, a type of due process violation that is analytically indistinguishable from *ex post facto* laws. *See, e.g., Marks v. United States*, 430 U.S. 188, 195 (1977) (retrospective application of pornography standards of *Miller v. California*, 413 U.S. 15 (1973), deprived petitioners of "fair warning"); *Bouie v. City of Columbia*, 378 U.S. 347, 353-55 (1964) (petitioners not given "fair warning" of unforeseen judicial construction of trespassing statute).

Here, Youngblood was put on notice at the time he decided to violate the sanctity of another citizen's home and person that his actions could render him criminally liable for the offense of aggravated sexual abuse, Tex. Penal Code Ann. §21.05 (Vernon 1974),[5] which they did. He likewise was put on notice that if he were found guilty of this offense, he could be sentenced to a term of imprisonment ranging from five years to 99 years or life. Tex. Penal Code Ann. §12.32(a) (Vernon Supp. 1979). Finally, he was on notice that because he previously had been convicted of a felony, he could be sentenced to a term of imprisonment ranging from 15 years to 99 years or life. Tex. Penal Code Ann. § 12.42(c) (Vernon 1974).

Although the court below did not consider whether Youngblood was deprived of "fair warning" by application of the statute to his case, it cannot seriously

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[5]This offense now is proscribed by Tex. Penal Code Ann. §22.021 (Vernon Supp. 1989).

be argued that he was. The penal statutes in effect at the time of the offense were sufficient to apprise him of the criminal sanctions to which he exposed himself by virtue of his felonious actions, and it would be nothing more than baseless speculation for him to assert that he would have acted differently had he known that an unauthorized punishment might have been assessed and that he then would have received a new trial. An asserted lack of fair warning cannot, as a matter of simple logic, be premised on such a contingency. *See Kring v. Missouri*, 107 U.S. 221, 239 (1883) (Matthews, J., dissenting, ("[I]t does not follow that such a contingency would have happened."); *State v. Norton*, 675 P.2d 577, 586 (Utah 1983), *cert. denied*, 466 U.S. 942 (1984) ("the *ex post facto* clause does not prevent the State from depriving a criminal defendant of an expectation as to a defense or procedure that has not yet accrued to his benefit."). Youngblood's case stands in stark contrast to *Weaver* and *Miller*, where the petitioners' punishments were effectively increased subsequent to the commission of their crimes, thereby denying them fair warning.[6]

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[6]In addition to failing to consider whether Youngblood was deprived of fair warning, the court below also considered it unimportant whether the statute in question constitutes a "legislative abuse," which it clearly does not.

> We find understandable the Texas legislature's distaste for a rule of law that affords convicted criminal defendants a "second bite at the apple." Given the vicissitudes of a criminal trial before a jury, such a second chance bestows a considerable benefit upon a defendant at the same time that it imposes an unnecessary burden upon the state. In that regard, article 37.10(b) may well effect wise public policy. However, we may not allow consideration of public policy to interfere with the central inquiry

(Footnote continued on next page)

C. Because the change wrought by Article 37.10(b) did not deprive Youngblood of a substantial right, its retroactive application does not violate the Ex Post Facto *Clause.*

Because the procedural nature of Article 37.10(b) is unquestioned, even by the court below (App. D 6), and because its retroactive application did not run afoul of the test of *Calder v. Bull* or deprive Youngblood of fair warning, the only issue that the Court must resolve in order to decide this case is whether Youngblood was deprived of a "substantial right." In answering this question in the affirmative, the court below concluded that the prior state law right must have been substantial for two reasons: because Article 37.10(b) was enacted to abolish it (App. D 8-9) and because "given the universal references in the *ex post facto* jurisprudence to such concepts as 'material disadvantage' and substantial 'protection,' we are confident that the right to have one's guilt retried before a different jury--with its attendant possibility that the outcome might be different the second time around--is comfortably encompassed within the category of rights considered 'substantial.'" (App. D 9).

The Fifth Circuit's analysis is wholly unpersuasive. Under the first rationale for its finding of substantiality, any change in the law that

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(Footnote continued from previous page)

> before us: whether the retroactive application of art. 37.10(b) worked to the disadvantage of Youngblood in the exercise of a substantial protection.

(App. D 9 n.2).

disadvantages a defendant necessarily will lead to the conclusion that the right of which he has been deprived should be classified as "substantial." A presumptively valid state court criminal conviction should not be overturned on the basis of such circular reasoning.

1. The conclusion of the court below is contrary to this Court's precedent.

The second rationale of the court below is pure *ipse dixit* and at odds with both the record in this case and the basis for the state law rule that obtained prior to the enactment of Article 37.10(b). "Although the distinction between substance and procedure might sometimes prove elusive," *Miller*, 482 U.S. at 433, the Court's decisions do shed some light on this question. It long has been recognized that an unauthorized punishment does not entitle a defendant to outright release on habeas corpus or an entire new trial; instead, the proper remedy is correction of the sentence. *Bozza v. United States*, 330 U.S. 160, 166 (1947); *In re Bonner*, 151 U.S. 242, 259-60 (1894).

> In this case it was on account of error in the sentence as originally imposed that that sentence was set aside. All the proceedings prior thereto stood unimpugned, and the Superior Court merely rendered the judgment which should have been rendered before.

Murphy v. Massachusetts, 177 U.S. 155, 157 (1900). *See also Gardner v. Florida*, 430 U.S. 349, 362 (1977) ("Petitioner's conviction, of course, is not tainted by the error in the sentencing procedure.").

Youngblood's case is no different. Here, as in *Bonner, Murphy* and *Bozza*, the guilt-innocence phase of trial was error-free. The court below found the right to a whole new trial to be substantial because "the outcome might be different the second time around . . . ." (App. D 8). Whatever validity that view might have in some other context, it has none in this case. The evidence against Youngblood was not just overwhelming--it was conclusive as to his guilt. The defense offered *no evidence*, and the record is devoid of any basis on which another jury might have reached a different result than did Youngblood's first jury.

No constitutional objective is served by requiring the states to grant criminal defendants not one, but two, fair trials. Texas caselaw before the enactment of Article 37.10(b) was based on nothing more than the state appellate court's recognition of its lack of authority to reform a jury verdict and had no foundation in the Constitution or traditional notions of equity and fairness. Further, as discussed, *supra*, at 4 n.3, the rule applied only in cases where a jury had assessed punishment. Moreover, it is far from clear that prior Texas law necessarily was beneficial to defendants such as Youngblood. For instance, had Youngblood received a 15-year sentence and an unauthorized fine and been granted a new trial, he could have been sentenced to life imprisonment upon retrial. Thus, the "right" of which he was deprived can only be characterized as "limited and insubstantial." *Beazell v. Ohio*, 269 U.S. at 171. To find an *ex post facto* violation in this case "mocks the substance of the *Ex Post Facto* Clause." *Dobbert*, 432 U.S. at 297.

2. The conclusion of the court below is contrary to the great weight of authority.

The Fifth Circuit's finding of a constitutional violation on the facts of this case stands alone in *ex post facto* jurisprudence. In at least three capital cases courts have rejected *ex post facto* challenges to the retroactive application of statutes that are indistinguishable in principle and, in fact, more onerous than that involved in the case at bar. In *State v. Norton*, 675 P.2d 577 (Utah 1983), *cert. denied*, 466 U.S. 942 (1984), the defendant obtained a reversal of his death sentence due to error in the sentencing phase. Utah law at the time of the offense provided for a mandatory life sentence in the event of such error. While Norton's appeal was pending, the legislature repealed that statute and enacted a new one that provided for a new sentencing proceeding with the potential for a new death sentence. The Utah Supreme Court held that application of the new statute to Norton's case was not *ex post facto* because it was merely procedural and, at the time it was passed, no "right" to a life sentence had accrued to Norton. *Id.* at 586. The *Norton* court found analogous the federal cases upholding extended statutes of limitations:

> While the defendants in the foregoing cases had an *expectancy* that the periods of limitation in effect when they committed their crimes would apply, the *ex post facto* clause did not preclude legislative extension of those periods where the expectancy had not accrued into a perfected defense before the amendment took effect. Thus, the defendants were not deprived of a right or a defense; they were merely deprived of an expectancy.

Id. (original emphasis). To the same effect are *Evans v. Thompson*, 881 F.2d 117, 120-21 (4th Cir. 1989), *cert. pending*, No. 89-516, and *Pickens v. State*, 730 S.W.2d 230, 235 (Ark. 1987), *cert. denied*, 484 U.S. 917 (1988), where the retroactive applications of similar statutes allowing the state to seek the death penalty on retrial were upheld as not *ex post facto*.

Youngblood's case differs only in that the application of Article 37.10(b) actually inured to his benefit in that the jury verdict was reformed to delete an unauthorized punishment. Unlike the defendants in *Norton, Evans* and *Pickens*, Youngblood was not put in the position of facing a potential death sentence on retrial. If those defendants' "right" to a life sentence upon reversal was not deemed substantial, *a fortiori*, Youngblood's "right" to an unwarranted and unnecessary retrial likewise cannot be so characterized.

3. "Substantial rights" should be defined as those enumerated in *Calder v. Bull*.

The elusive distinction between substance and procedure need not be drawn in order to determine whether the retroactive application of a particular law violates the *Ex Post Facto* Clause. A much more workable test is simply to inquire whether any of the concerns listed in *Calder v. Bull* are implicated. By applying such a test, courts could confidently rely on a bright-line rule that would obviate the uncertainty experienced by the court below as to what should be classified as a substantial right. In addition, such a test is, for the most part, entirely consistent with the Court's decisions.

In the majority of cases in which the Court has found an *ex post facto* violation, it would have done so under the *Calder* standard. Thus, in *In re Medley*, 134 U.S. 160 (1890), it was held *ex post facto* to retroactively apply a statute calling for solitary confinement prior to execution of a death sentence, when prior law did not. Addition of the condition of solitary confinement increased the punishment beyond that in effect at the time of the offense.

Similarly, in *Lindsey v. Washington*, 301 U.S. 397 (1937), the retroactive application of a statute that provided for a mandatory sentence of fifteen years was struck down because it deprived defendants of the benefit of prior law, which provided for a range of punishment. Although the *Lindsey* Court was of the opinion that it "need not inquire whether this is technically an increase in the punishment annexed to the crime," *id.* at 401, it is clear that the statute did in fact effectively increase the potential punishment by eliminating the possibility of a sentence less than the maximum. *Medley* and *Lindsey* fit neatly within the framework of *Calder v. Bull*.

More recently, in both *Weaver v. Graham* and *Miller v. Florida*, the Court found a constitutional defect in the retroactive application of changes in the law that increased the amount of time prisoners must serve before achieving eligibility for parole. In both cases, the Court recognized that the change in law effectively added to the punishment that was prescribed at the time when the crime was consummated. *Miller*, 482 U.S. at 433-34; *Weaver*, 450 U.S. at 33. Again, the results reached are in harmony with *Calder*.

The court below was of the opinion that

Cummings v. Missouri, 4 Wall. 277, 18 L.Ed. 356 (1867) and *Ex parte Garland*, 4 Wall. 333, 18 L.Ed. 366 (1867), support its conclusion that Youngblood's case should be decided under a standard other than *Calder* (App. D 8). In fact, those cases stand for the opposite proposition. Both *Cummings* and *Garland* involved loyalty oaths following the War Between the States, with the exclusion from certain professions the penalty for failing to take the oaths. In finding that requiring the oaths violated the Constitution, the Court held that exclusion from one's chosen vocation constitutes "punishment" within the meaning of the *Ex Post Facto* Clause. *Cummings, id.* at 318, 18 L.Ed. at 361; *Garland, id.* at 377, 18 L.Ed. at 370. Thus, the holdings in those cases are fully consistent with the test of *Calder*.

The only decisions of this Court that cannot be reconciled with *Calder* are *Kring v. Missouri*, 107 U.S. 221 (1883) and *Thompson v. Utah*, 170 U.S. 343 (1898). In *Kring*, the law at the time of the offense and trial provided that a conviction of second-degree murder acted as an acquittal of the greater offense of first-degree murder. Kring initially pled guilty to second-degree murder and was sentenced to twenty-five years imprisonment, but succeeded in having the conviction reversed on appeal. By the time he was tried again, Missouri law had been changed to allow the state to seek a conviction for first-degree murder and a sentence of death. The Court held that retroactive application of the new law to Kring's case was *ex post facto* because it deprived the defendant of a valid defense and effectively increased his punishment. *Id.* at 229.

The validity of *Kring* is questionable in light of subsequent decisions of this Court. *See, e.g., Alabama v. Smith*, ___ U.S. ___, ___, 109 S.Ct. 2201, 2206 (1989) (no constitutional impediment to imposing greater

sentence on retrial than first sentence imposed in connection with guilty plea); *Poland v. Arizona*, 476 U.S. 147, 152 (1986) (where conviction is reversed, slate is wiped clean, and defendant may be sentenced to any lawful punishment); *Ohio v. Johnson*, 467 U.S. 493, 501-02 (1984) (acceptance of guilty plea to lesser included offense does not constitute an "acquittal" of greater offense for double jeopardy purposes). Given the current state of the law, it would seem that Kring had no right -- much less a "substantial" right -- to an implied acquittal.

Even if *Kring* remains good law, however, it avails Youngblood nothing. The decisive distinction between *Kring* and the case at bar is that the defendant in that case entered into a plea agreement pursuant to which he would receive an acquittal of a capital offense. Thus, at least at the time of his plea, if not the commission of his offense, he relied on Missouri law as then in force. Youngblood is unable to demonstrate similar reliance to his detriment. The determinative event in the legal proceedings against Youngblood is that his jury imposed a punishment that it was without authority to assess. This fortuity was wholly outside Youngblood's control and entirely unforeseeable. Thus, neither at the time of the offense nor at trial could Texas law as it then existed have entered into Youngblood's thinking process. There was no lack of fair warning, no detrimental reliance and, hence, no *ex post facto* violation.

Thompson v. Utah is of even more questionable precedential value. There, state law was changed between the defendant's first and second trials to provide for eight-member juries rather than the traditional twelve persons. The *Thompson* Court held that retroactive application of the eight-member jury rule was *ex post facto* because "the jury referred to in

the original constitution and in the sixth amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less." *Thompson*, 170 U.S. at 349. In *Williams v. Florida*, 399 U.S. 78 (1970), the Court rejected the notion that the constitutional right to a jury embraces the numerical requirement of twelve jurors. Although the Fifth Circuit was of the opinion that *Thompson v. Utah* remains viable in light of *Williams* (App. D 7 n.1), the state is unable to understand how that could be. In any event, *Thompson* offers Youngblood no support. The constitutional right to trial by jury never has been interpreted to embrace a right to two fair trials.

This case provides an opportunity for the Court to clarify its prior *ex post facto* decisions. Strict adherence to the venerable test of *Calder v. Bull* will provide a standard that can be readily applied and easily understood. Reliance on such a rule will obviate grappling with such slippery questions as substance as opposed to procedure and which rights are "substantial." Finally -- with the possible exceptions of *Kring* and *Thompson v. Utah* -- the *Calder* test does not mandate a different result than under any other approach that the Court has employed.

CONCLUSION

For the above reasons, the state respectfully requests that the judgment of the Court of Appeals for the Fifth Circuit be reversed.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant
Attorney General

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division

S. MICHAEL BOZARTH
Assistant Attorney General

CHARLES A. PALMER*
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

ATTORNEYS FOR RESPONDENT

* *Counsel of Record*

QUESTION PRESENTED

Whether the retrospective application of a procedural change in the law which has the effect of depriving an inmate of the right to a reversal and a new jury trial amounts to a deprivation of a substantial personal right thereby violating the *Ex Post Facto* Clause, Article I, § 10 of the United States Constitution.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, wherein the Respondent was granted relief, is attached to the petition for certiorari as Appendix D.[1] *Youngblood* v. *Lynaugh*, 882 F.2d 956 (5th Cir. 1989). The order of the court of appeals denying the state's suggestion of rehearing en banc is Pet. App. E. The opinion of the federal district court is Pet. App. C. The opinion of the Texas Court of Criminal Appeals denying Respondent's application for a writ of habeas corpus is Pet. App. B. *Ex parte Youngblood*, 698 S.W.2d 671 (Tex. Crim. App. 1985) (en banc). The order of the state district court recommending that habeas corpus relief should be granted is Pet. App. A.

JURISDICTION

The State has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Art. I., § 10 cl. 1 provides as follows:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, *ex post facto* Law,

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[1] References to appendices attached to the petition are hereinafter referred to as "Pet. App." and followed by the letter associated with the appendix. The appendices attached to the petition are being used in lieu of a joint appendix. References to Petitioner's Brief will be referred to as "Pet. Brief" and followed by the page number. References to the federal record on appeal will be designated as "ROA" and followed by the appropriate page number.

or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Tex. Code Crim. Proc. Ann. art. 37.10(b) (Vernon Supp. 1985) provides as follows:

> If the jury assesses punishment in a case and in the verdict assesses both punishment that is authorized by law for the offense and that is not authorized by law for the offense, the court shall reform the verdict to show the punishment authorized by law and to omit the punishment not authorized by law. If the trial court is required to reform a verdict under this subsection and fails to do so, the appellate court shall reform the verdict as provided by this subsection.

STATEMENT OF THE CASE

On March 17, 1982, Respondent was convicted of Aggravated Sexual Abuse, a first degree felony. During the punishment phase of the trial, the jury found that Respondent had been previously convicted of a felony; hence Respondent's punishment was enhanced and he was sentenced to life in prison and a fine of $10,000. The Twelfth Supreme Judicial District Court of Appeals, in Tyler, Texas, affirmed the conviction on August 13, 1984. Respondent did not appeal the conviction further. It should be noted that the conviction became final before the effective date of Tex. Code Crim. Proc. Ann. art. 37.10(b), which was on June 11, 1985.

On September 19, 1984, Respondent filed an application for a writ of habeas corpus pursuant to a decision by the Texas Court of Criminal Appeals in *Bogany* v. *State*, 661 S.W.2d 957 (Tex. Crim. App. 1983). The Court in *Bogany* held that the enhancement provision of Tex. Penal Code § 12.42(c) (Vernon Supp. 1979) does not authorize the punishment to include a fine in addition to a prison sentence. The Court concluded that the jury's verdict was

"void at its inception" (661 S.W.2d at 959) and the judgment was reversed. In light of *Bogany*, Respondent had a reasonable expectation that his conviction would likewise be reversed. On April 2, 1985, the trial court, in its recommendation to the Court of Criminal Appeals, concluded that relief should be granted. Pet. App. A.

However, after *Bogany* was decided and after the Court of Criminal Appeals granted numerous applications for writs of habeas corpus pursuant to *Bogany*, the Texas Legislature passed Tex. Code Crim. Proc. Ann. art. 37.10(b):

> If the jury assesses punishment in a case and the verdict assesses both punishment that is authorized by law for the offense and punishment that is not authorized by law for the offense, the court shall reform the verdict to show the punishment authorized by law and to omit the punishment not authorized by law. If the trial court is required to reform a verdict under this subsection and fails to do so, the appellate court shall reform the verdict as provided by this subsection.

Again the statute went into effect on June 11, 1985.

On October 8, 1985, the Texas Court of Criminal Appeals announced its first decision on the applicability of the changes in art. 37.10(b) in *Ex parte Johnson*, 697 S.W.2d 605 (Tex. Crim. App. 1985), which held that the new statute was merely procedural in nature and could be applied retrospectively. In dissent, Judge Onion expressed the opinion that the retroactive application of the statute deprived Johnson of substantial protection and violated the *Ex Post Facto* Clause.

One week later, on October 16, 1985, the Court of Criminal Appeals denied Respondent's application for writ of habeas corpus, basing its decision on *Ex parte*

Johnson. As in *Johnson*, the Court applied the new statute to Respondent's conviction even though the offense had occurred and the conviction had become final prior to the enactment of the new statute. Pet. App. B-1. *Ex parte Youngblood*, 698 S.W.2d 671 (Tex. Crim. App. 1985). The Respondent therefore filed a pro se petition for a writ of habeas corpus with the United States District Court in Tyler, basing his petition on the dissent presented by Judge Onion.

The United States District Court initially issued an order summarily dismissing the application (ROA 51). Respondent then sought and received assistance from Staff Counsel for Inmates. Counsel filed a Motion to Reconsider (ROA 36), and, in the alternative, Notice of Appeal (ROA 29). In response, the Court withdrew its earlier order and ordered a hearing on the merits (ROA 28). The District Court issued its decision on September 13, 1988, denying Respondent's allegation that the retrospective application of Tex. Code Crim. Proc. Ann. art. 37.10(b), by the Texas Court of Criminal Appeals, violates the *Ex Post Facto* Clause of the Constitution. Pet. App. C. Respondent again filed notice of appeal (ROA 7) and requested a certificate of probable cause (ROA 6). In response, Judge Parker issued a certificate of probable cause to the Court of Appeals (ROA 1).

The Court of Appeals for the Fifth Circuit considered the appeal and granted relief on September 8, 1989. Pet. App. D. *Youngblood* v. *Lynaugh*, 882 F.2d 956 (5th Cir. 1989). On October 19, 1989, the Court of Appeals denied the Petitioner's suggestion for rehearing en banc. Pet. App. E. The Supreme Court granted the State's Petition for Writ of Certiorari on December 11, 1989.

SUMMARY OF ARGUMENT

The case law concerning the *Ex Post Facto* Clauses developed by the Supreme Court is extensive. The

Court's test for determining whether a criminal law is *ex post facto* involves two critical elements: "first, the law 'must be retrospective, that is, it must apply to events occurring before its enactment'; and second, 'it must disadvantage the offender affected by it.'" *Miller* v. *Florida*, 482 U.S. 423, 430 (1987), quoting *Weaver* v. *Graham*, 450 U.S. 24, 29 (1981). Additionally, no *ex post facto* violation occurs if a change does not alter "substantial personal rights," but merely changes "modes of procedure which do not affect matters of substance." *Miller*, 482 U.S. at 430, quoting *Dobbert* v. *Florida*, 432 U.S. 282, 293 (1977). However, the "alteration of a substantial personal right . . . is not merely procedural, even if the statute takes a seemingly procedural form." *Weaver*, 450 U.S. at 29 n.12; *Miller*, 482 U.S. at 433. In the instant case, the Texas Court of Criminal Appeals decided *Bogany, supra*, and numerous inmates were able to utilize the decision to obtain habeas corpus relief. The Texas legislature responded by passing Tex. Code Crim. Proc. Ann. art. 37.10(b) to prevent additional inmates, such as Respondent, from obtaining reversals and new jury trials. In granting relief, the Court of Appeals for the Fifth Circuit applied the Court's test to the facts in this case and concluded that the retrospective application of Tex. Code Crim. Proc. Ann. art. 37.10(b) is *ex post facto*.

In presenting its case, the State of Texas has ignored the Court's test for determining whether a criminal law is *ex post facto*. Instead, the State erroneously argues that the applicability of the Clause has been limited to the four exemplary categories of cases enumerated by Justice Chase in *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798). The State has rejected the numerous cases by the Court holding that the retrospective application of procedural changes in the law can be *ex post facto*. Again as recently as 1987, in *Miller* v. *Florida*, the Court held that a change

in a procedural law can fall within the *ex post facto* prohibition if it alters "substantial personal rights."

ARGUMENT AND AUTHORITIES

THE RETROSPECTIVE APPLICATION OF ARTICLE 37.10(b) VIOLATES THE EX POST FACTO CLAUSE OF THE CONSTITUTION

The Supreme Court has regularly considered the issue of whether a criminal law is *ex post facto*. The Court first considered the Constitutional prohibition against *ex post facto* laws in *Calder* v. *Bill*, *supra*. In an oft-quoted opinion, Justice Chase listed exemplary kinds of laws barred by the constitutional provision, including:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and requires less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

3 U.S. at 390. The next sentence in Justice Chase's opinion is not quoted as often, but he adds that the prohibition includes all other similar kinds of laws: "All these, and similar laws, are manifestly unjust and oppressive." He goes on to say that the precise meaning of the prohibition is that the States cannot pass any laws to deprive a citizen of a right given to him by existing laws. 3 U.S. at 394.

There are many reasons why the *Ex Post Facto* Clauses were included in the Constitution. A primary reason was to restrict "governmental power by restraining arbitrary and potentially vindictive legislation." *Weaver*, 450 U.S. at

29. See also *Malloy* v. *South Carolina*, 237 U.S. 180, 183 (1915); *Kring* v. *Missouri*, 107 U.S. 221, 229 (1883); *Fletcher* v. *Peck*, 6 Cranch 87, 138 (1810); *Calder* v. *Bull*, 3 U.S. at 396 (Paterson, J.). The Clauses were likewise aimed at "preventing legislative abuses." *Miller*, 482 U.S. at 423; *Calder* v. *Bull*, 3 U.S. at 396 (Paterson, J.), at 399-400 (Iredell, J.). The Framers of the Constitution also "sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver*, 450 U.S. at 28-29; *Dobbert* v. *Florida*, 432 U.S. 282, 298 (1977); *Kring*, 107 U.S. at 229; *Calder* v. *Bull*, 3 U.S. at 387.

With these principles and purposes in mind, the Court has established its test for determining whether a criminal law is *ex post facto*. Two critical elements must be present: "it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver*, 450 U.S. at 29; *Miller*, 482 U.S. at 430. The Court has added, however, that the prohibition against *ex post facto* laws does not extend to every change of law that "may work to the disadvantage of a defendant." It is intended instead to secure "substantial personal rights" from retrospective deprivation. *Miller*, 482 U.S. at 430; *Portley* v. *Grossman*, 444 U.S. 1311, 1312 (1980); *Dobbert*, 432 U.S. at 293.

The issue herein focuses on the extent to which the retrospective application of procedural changes in the law may be *ex post facto*. The Court has held that *ex post facto* violations do occur if the retrospective application of procedural changes in the law alters "substantial personal rights," but do not occur when the law merely changes "modes of procedure which do not affect matters of substance." *Miller*, 482 U.S. at 430; *Dobbert*, 432 U.S. at 293; *Hopt* v. *Utah*, 110 U.S. 574 (1884). Stated differently, to

be *ex post facto*, the totality of the procedural changes must be more onerous than the prior law. *Dobbert*, 432 U.S. at 296-297. Furthermore, the "alteration of a substantial personal right . . . is not merely procedural, even if the statute takes a seemingly procedural form." *Weaver*, 450 U.S. at 29 n.12; *Miller*, 482 U.S. at 433; *Thompson* v. *Utah*, 170 U.S. 343, 354-355 (1898). Procedural statutes must "leave untouched all the substantial protections with which existing law surrounds the person accused of crime." *Duncan* v. *Missouri*, 152 U.S. 377, 382 (1894). Overall, the Court has consistently held that the retrospective application of procedural changes in the law can in fact be *ex post facto*. The determining factor in these cases is whether an individual is deprived of substantial personal rights.

The Court has issued several opinions that illustrate these principles. In *Kring* v. *Missouri*, 107 U.S. 221 (1883), the defendant had originally been charged with first degree murder but was permitted to plead guilty to second degree murder, which was accepted by both the prosecuting attorney and the court. He subsequently appealed alleging he had been promised a 10 year sentence, rather than a 25 year sentence. The conviction was reversed, and the State responded by seeking and obtaining a conviction for first degree murder. The defendant again appealed claiming that the law in effect at the time of the offense prevented the State from seeking a conviction for first degree murder after having agreed to second degree murder. The State countered by saying that the change in the law was merely procedural and hence the new law controlled. The Court was of the opinion that the new law improperly penalized the defendant for appealing his conviction and proving that his sentence was erroneous. It had the effect of altering the situation of the

defendant to his disadvantage. The Court concluded that the new law, although procedural in nature, was *ex post facto*. 107 U.S. at 235.[2]

In *Thompson* v. *Utah*, 170 U.S. 343 (1898), the Court held that a defendant cannot be retried under a new statute requiring only eight jurors, since the alleged offense was committed and first tried when applicable law guaranteed a trial by a jury of twelve. The Court indicated that statutes regulating procedure will violate the *Ex Post Facto* Clause if they deprive a defendant of a "substantial right given him by the law in force at the time of which his guilt relates." 170 U.S. at 352.

In *Weaver, supra*, the Court once again stated that a law will be *ex post facto* if the law is retrospective and disadvantages the offender affected by it. 450 U.S. at 29. The statute in question changed the formula to reduce the amount of monthly gain-time available to an inmate who complied with prison rules and performed assigned tasks. The petitioner's situation was materially altered and disadvantaged by the reduced opportunity to shorten his sentence through good conduct. In applying the Court's test to the facts, the Court held that the Florida statute was unconstitutional as an *ex post facto* law as applied to the petitioner since his crime was committed before the statute was enacted.

In *Miller, supra*, the Court held that the application of revised sentencing guidelines to a defendant, whose crime occurred before the effective date of the new

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[2] It should be noted that the district court in *Evans* v. *Thompson*, now pending before the Court, No. 89-516, was of the opinion that *Kring* was overruled or modified by *Dobbert* v. *Florida*, 432 U.S. 282 (1977). However, the Court cited *Kring* with approval in a case four years after *Dobbert* in *Weaver* v. *Graham*, 450 U.S. 24, 29 n.12 (1981).

guidelines, was *ex post facto*. The changes in sentencing guidelines were not merely procedural since the application of the new guidelines produced a more onerous sentence than the law in effect at the time of the offense in the defendant's case.

Each of these cases illustrates the basic principles that led to the Court's test as announced in *Weaver* and followed in *Miller*. In each case, a procedural change in the law was applied retrospectively, and the individual affected by the change in the law suffered a deprivation of a substantial personal right given to him by the law in effect at the time of the offense.

The Court has similarly decided numerous cases involving the retrospective application of procedural changes in the law that were not *ex post facto* since the individual affected had not been deprived of a substantial personal right. A statute which merely enlarges the class of persons who may be competent to testify is not *ex post facto*. *Hopt* v. *Utah*, 110 U.S. 574 (1884). The abolition of courts and the creation of new ones, while leaving untouched all the substantive protections which existed at the time of the offense, does not fall within the Constitutional prohibition against *ex post facto* laws. *Duncan* v. *Missouri*, 152 U.S 377 (1894). The defendant therein was not in any way materially disadvantaged by the change in the law. A change in the form of execution from hanging to electrocution is not prohibited. If anything, the change in the law was ameliorative, providing a less painful method of execution. *Malloy* v. *South Carolina*, *supra*. Authorizing the State to appeal a case from an intermediate appellate court to the State Supreme Court did not "dispense with any of those substantial protections with which the existing law surrounds the persons accused of crime." *Mallett*

v. *North Carolina*, 181 U.S. 589, 597 (1901).[3] A statute which provided that co-defendants shall be tried jointly, instead of individually, does not deprive the defendants of any defenses or substantive guarantees provided previously nor change the legal definition of the criminal act, nor the proof required to establish guilt; consequently, the change in law was not *ex post facto*—the defendants were not deprived of any substantial personal rights. *Beazell* v. *Ohio*, 269 U.S. 167 (1925). In *Dobbert*, *supra*, the Court found that a Florida statute which changes the relative roles of the jury and judge in death penalty cases was not *ex post facto* because the defendant could not show that he was deprived of any substantial personal rights. Finally, changes in parole revocation guidelines are not *ex post facto* when they neither deprive a parolee of any preexisting rights nor enhance the punishment imposed. *Portley* v. *Grossman*, 444 U.S. 1311 (1980). In all of these cases, the individuals affected by the changes in the law were not so affected as to suffer a deprivation of substantial personal rights. In some of the cases the individuals speculated that they possibly could suffer harm, but the individuals affected had to unequivocally show that they would be materially harmed in order to obtain relief.

The fundamental question involved in all of these cases focuses on the point at which a change in a procedural law will be sufficient to transgress the constitutional prohibi-

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[3] The United States government relies on *Mallett* for the proposition that the procedural law involved herein is not *ex post facto*. The fact situations, however, are not comparable. The statute in *Mallett* broadened the scope of due process, albeit for the State. The situation herein is just the opposite. The statute eliminated the Respondent's right to due process as it existed at the time of the offense, denying him his right to a reversal and new jury trial.

tion. Justice Stone indicated that the point at which a law will become *ex post facto* "cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree." *Beazell*, 269 U.S. at 171. The determining factor is the point at which an individual is deprived of substantial personal rights.

Keeping these principles in mind, we come to the issue of whether the procedural change in the law here is *ex post facto*. The State concedes that the first prong of the test has been satisfied—the change in art. 37.10(b) has been applied retrospectively. The sole issue then is whether the Respondent has been disadvantaged by the retrospective application of art. 37.10(b). Stated differently, the issue is whether Respondent has been deprived of a substantial personal right. In the instant case, numerous inmates obtained habeas corpus relief pursuant to *Bogany, supra*. Their cases were reversed and remanded for a new jury trial. Respondent had a reasonable expectation that his case would likewise be reversed and that he would have the opportunity for a new jury trial. The trial court agreed that, pursuant to *Bogany*, relief should be granted. Pet. App. A. However, while Respondent's application for writ of habeas corpus was pending in the Court of Criminal Appeals, the Texas legislature changed the law to eliminate the possibility that additional inmates, such as Respondent, could obtain relief. The Court of Criminal Appeals thereafter utilized the new law to deny Respondent's application for a writ of habeas corpus. Instead of obtaining a reversal and new jury trial, Respondent's conviction was affirmed and his sentence modified. For an inmate, the right to a reversal is of paramount importance. Respondent has been appreciably disadvantaged by the retrospective application of the new law.

Regarding the question of whether the deprivation herein was substantial, the Court of Appeals said the following:

> Delineation of the boundary between "substantial" rights and those considered not substantial, like the distinction between fundamental and non-fundamental rights, is an inquiry not susceptible of examination by scientific formulae or comprehensive enumeration. However, given the universal references in *ex post facto* jurisprudence to such concepts as "material disadvantage" and substantial "protection," we are confident that the right to have one's guilt retried before a different jury—with its attendant possibility that the outcome might be different the second time around—is comfortably encompassed within the category of rights considered "substantial."

Pet. App. D-9. The question of whether the deprivation herein was substantial cannot seriously be challenged. As the Court of Appeals correctly concluded, the right herein was "comfortably" encompassed within the category of rights considered substantial. The second prong of the Court's test is satisfied, and the Court of Appeals appropriately granted Respondent's petition for writ of habeas corpus.

The law in Texas, by comparison, also prohibits the retrospective application of procedural changes that deprives a defendant of substantial protection. In the Interpretive Commentary of the applicable Texas provision prohibiting *ex post facto* laws, Article I, Section 16, of the Texas Constitution (Vol. I, pp. 371, 372, Vernon's Constitution of the State of Texas, Annotated) it is written:

> Although ordinarily laws changing procedure are not within the inhibition, still if a procedural change is retroactive and results in depriving the accused of

> substantial protections, it is unconstitutional. *Ex parte Roper*, 61 [Tex] Cr.R. 68, 134 S.W. 334 (1911).

In his dissenting opinion in *Ex parte Johnson*, 697 S.W.2d at 609, Judge Onion, then presiding judge of the Texas Court of Criminal Appeals, stated that Art. 37.10(b) was an "overreaction" to *Bogany*. He added that the provision violates a defendant's basic right to have the jury assess the punishment as part of the verdict. 697 S.W.2d at 612 n.3. Judge Onion concluded that art. 37.10(b), when applied retroactively, undoubtedly violates the prohibition against *ex post facto* legislation.

ANALYSIS OF THE STATE'S ARGUMENT

The State's approach has been to isolate its argument to only one aspect of the Court's decisions, as seen in the Petitioner's emphasis on the following excerpt from *Beazell:*

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, it prohibited as *ex post facto*.

269 U.S. at 169-70, quoted in *Dobbert* v. *Florida*, 432 U.S. 282, 292 (1977). Pet. Brief 9. The State of Texas argues that a criminal law is not *ex post facto* unless it falls within the parameters of this provision.

The Supreme Court has not, however, limited the applicability of the Ex Post Facto Clauses to these areas. Even in *Beazell*, the Court went on to say that "there may be procedural changes which operate to deny to the

accused a defense available under the laws in force at the time of the commission of his offense, or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition." 269 U.S. at 170. As discussed earlier, the Court has decided numerous cases which illustrate Justice Stone's statement and contradict the State's argument.

The State goes on to refer to the four exemplary categories enumerated by Justice Chase in *Calder* v. *Bull* as the "time-honored test" in determining whether a law is *ex post facto*. Pet. Brief 11. The State does not acknowledge the existence of the Court's test as presented in *Weaver* and followed in *Miller*. Perhaps the State is implying that the Court's test is immaterial, or at least incorrect.

In an effort to convince the Court that the standard to be employed is the "time-honored test" of *Calder* v. *Bull*, the State reevaluates past decisions by "pigeon holing" them into one of the four exemplary categories enumerated by Justice Chase. Even then, the State acknowledges that some of the Court's past decisions cannot be harmonized with its theory. Pet. App. 10. The Court of Appeals characterized the State's approach as presenting case law to "erroneously suggest that a statute must fit neatly within the confines of one of these enumerated pigeon holes or else may not rightly be said to violate the *Ex Post Facto* clause." Pet. App. D-7. The State's approach improperly misrepresents the law to unduly limit the value of the *Ex Post Facto* Clauses.

The Supreme Court has regularly been presented with the type of argument presented by the State. It is essentially a variation of the old theme that procedural changes in the law can never be *ex post facto*. In *Kring*, *supra*, the Court provided a response to the State's argument:

> Can the law with regard to bail, to indictments, to grand juries, to the trial jury, all be changed by state legislation, after the offense committed, to the disadvantage of the prisoner, and not held to be *ex post facto*, because it relates to procedure, . . . can any substantial right which the law gave the defendant at the time to which his guilt relates be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot.

107 U.S. at 232. Justice Miller's comments are consistent with the Court's numerous decisions holding procedural changes in the law can be *ex post facto*. It is too late in the day for the State's argument to be credible.

The Supreme Court's past decisions on this issue clearly indicate that the value of the *Ex Post Facto* Clauses is broad, rather than narrow. Or, as Judge Gee concluded, the possibility that a retrospective application of a procedural change in the law will be *ex post facto* "constitutes more of a bright spectrum than a bright line." Pet. App. D-10. In other words, the Court has granted relief in a wide array of circumstances involving procedural changes in the law. The State's approach, joined by the federal government, is understandable. Governments by and large do not want limits on their authority; consequently, it is understandable why both the State of Texas and the United States have encouraged the Court to redefine and limit the *Ex Post Facto* Clauses. The decisions of the Court, however, do not support their position. The applicability of the *Ex Post Facto* Clauses regarding procedural changes in the law is somewhat broad.

The State criticizes the Court of Appeals for its failure to consider whether Youngblood was deprived of fair warning by the application of the statute in this case.

Respondent can only speculate as to why the Court of Appeals did not see a need to perform such an analysis. Respondent will, nonetheless, offer one possible explanation. In *Weaver*, the Court announced its test to be used in determining whether a criminal law is *ex post facto*, and the Court stated that the test is derived from the principles that individuals must be given fair warning and that governmental power must be restricted by restraining arbitrary and vindictive legislation. 450 U.S. at 28-29. The Court of Appeals appropriately employed the Court's test. The Court of Appeals neither had a reason nor a right to second guess the validity of the test. There was no reason to examine the facts herein utilizing the principles underlying the test.

Even though the Court of Appeals did not feel compelled to discuss the principles underlying the test, Respondent desires to do so. Respondent particularly wants to examine the fundamental principle that "the *Ex Post Facto* Clauses were included in the Constitution to assure that federal and state legislatures were restrained from enacting arbitrary and vindictive legislation." *Miller*, 482 U.S. at 423, quoting *Calder* v. *Bull*, 3 U.S. at 389. It is clear that the purpose for the enactment of art. 37.10(b) was to arbitrarily prevent additional inmates, such as the Respondent, from obtaining a reversal, new jury trial and possible acquittal. As in *Kring*, 107 U.S. at 235, the State is attempting to penalize Respondent, and all other inmates similarly situated, for proving they have an unauthorized sentence. The State has attempted to downplay the significance of the detrimental impact of the statute on inmates. There are, however, few rights more important to an inmate than the right to a reversal. Furthermore, the action of the legislature seriously undermines the integrity of the judicial and appellate processes.

The State's argument basically stands for the proposition that a legislature may eliminate the effects of unpopular decisions by the appellate courts by enacting new legislation that will eliminate the possibility that additional individuals will obtain relief, label the new legislation as a procedural change in the law, and apply the change retrospectively. The purpose of the *Ex Post Facto* Clauses was precisely to stop the type of activity going on here—to restrain legislatures from enacting arbitrary and vindictive legislation to the detriment of the citizens of the American society.

Judge Garza noted (Pet. App. D-9) he could understand why the legislature thought it distasteful to give convicted criminal defendants a second trial. He indicated that the act of the legislature may be wise public policy; however, wise public policy cannot justify the adoption of *ex post facto* laws. Justice Chase noted that the British government attempted to justify its habit of enacting *ex post facto* laws by saying it was necessary for the "*safety* of the kingdom." 3 U.S. at 389. The Framers of the Constitution did not accept the argument. They believed it was necessary to outlaw this type of legislative activity as a violation of the "vital principles of our *free Republican governments*." 3 U.S. at 388. Maintaining the provisions found in the Constitution is more important than depriving a few convicted criminals a retrial.[4] The government cannot be allowed to enact laws which are *ex post facto* for the sole reason of changing the outcome in a court's opinion.

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[4] The Court has emphasized that the Law must be followed, even if a criminal goes free in the process. See, e.g., *Mapp* v. *Ohio*, 367 U.S. 643, 659 (1961); *Olmstead* v. *United States*, 277 U.S. 438, 485 (1928) (dissenting opinion by Justice Brandeis).

The State likewise attacks the conclusion of the Court of Appeals that the Respondent was deprived of a substantial right. The fundamental issue here is whether the right to a new jury trial, after an appellate court has ruled that a reversible error was committed during the initial trial, is a substantial personal right. The crux of the State's argument is that this Court has never held that a defendant is entitled to an entire new jury trial if the punishment assessed by the jury is unauthorized by law. Pet. Brief 16.

The State's argument, however, begs the question. The Texas Court of Criminal Appeals in *Bogany, supra*, concluded that under the laws of the State of Texas the defendant therein was entitled to a new jury trial. The right to a new jury trial exists under the laws of the State of Texas.[5] The Respondent has the same rights and is likewise entitled to a new jury trial.

The States are not obligated to curtail the rights of people to conform to the minimum rights provided by federal law: "It is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires." *California* v. *Ramos*, 463 U.S. 992, 1014 (1983). When a State creates rights greater than those protected directly by the Federal Constitution, the State created rights are entitled to protection by the federal courts. *Mills* v. *Rogers*, 457 U.S. 291, 300 (1982). It does not matter what rights might have

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[5] The right to a jury trial is of paramount importance in the criminal trial process in Texas. The assessment of the sentence is within the exclusive province of the jury, and the trial judge cannot change the verdict nor refuse to abide by it. See Judge Onion's review of the role of the jury in Texas in *Ex parte Johnson*, 697 S.W.2d 605, 612 n.3 (Tex. Crim. App. 1985).

existed under the law of any other jurisdiction. Respondent is entitled to have his State created rights protected by the federal courts. According to the law in Texas applicable to offenses committed before the change in art. 37.10(b), Respondent has a right to a reversal and a new jury trial. He is entitled to have these rights protected.

We therefore return to the question whether Respondent was deprived of a substantial personal right. The State once again focuses on the categories enumerated in *Calder* v. *Bull*. The State argues that the Court should find that the concept of substantial personal rights is limited to the categories in *Calder*. The State admits, however, that its proposed test is not entirely consistent with the Court's decisions. Pet. Brief 19. The State goes on to say that the proposal should be adopted because it is "easily understood." Pet. Brief 23. In other words, the Court should abandon its prior decisions in order to have an "easily understood" standard. Justice Stone long ago explained there is no simple scheme to artificially determine when the deprivation of an individual's rights is substantial: "[it] cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree." *Beazell*, 269 U.S. at 171. The State's desire to limit the concept of substantial personal rights to the categories found in *Calder* is both simplistic and unrealistic. In this case, depriving Respondent of a reversal and the right to a new jury trial and, instead, affirming his conviction has clearly deprived Respondent of a substantial personal right.

The State criticizes the Court of Appeals for reasoning that the legislature must have thought that the right to a new trial was substantial since the legislature enacted the change in art. 37.10(b) to stop the onslaught of reversals. The State characterized the statement as circular reasoning. Pet. Brief 15-16. The observation of the Court of Appeals nonetheless was apropos. The legislature wanted a different outcome. The legislators thought it was important. It was significant to them. It is likewise significant to Respondent and all other inmates similarly situated. The State is being disingenuous in arguing that Respondent has not been deprived of a substantial right.

The Court of Appeals appropriately granted relief because the Respondent was able to show that (1) the criminal law was applied retrospectively, and (2) that he was disadvantaged by the retrospective application of the new law. Respondent was able to satisfy both prongs of the requirements set forth in *Weaver* and *Miller*, and the Court of Appeals so found. The Respondent was sentenced under a procedure that was not authorized at the time of the commission of the offense. Whereas previously the Respondent, and all others similarly situated, were entitled to a reversal and retrial, the retrospective application of the new statute resulted in a mere modification of his judgment and sentence. The change in procedure materially disadvantaged Respondent by eliminating his right to be sentenced according to the law in existence when the offense was committed. It resulted in eliminating his right to a reversal and retrial by jury and replacing it with an affirmance of his conviction. Respondent lost the substantial personal rights that comes with any retrial and possible acquittal. The retrospective application of art. 37.10(b) is clearly an onerous application of an *ex post facto* change in the law. The constitutional prohibition against *ex post facto* laws undoubtedly applies in this case. The decision of the Court of Appeals accurately applies the Supreme Court's past holdings to the facts in this case. The decision of the Court of Appeals should be affirmed.

CONCLUSION

For these reasons, Respondent respectfully requests that the judgment of the Court of Appeals for the Fifth Circuit be affirmed.

Respectfully submitted,

JON R. "RANDY" FARRAR
Administrator, Inmate Legal Services
Staff Counsel for Inmates
Texas Department of Criminal Justice
Institutional Division
P.O. Box 99
Huntsville, Texas, 77342-0099
(409) 294-2363

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No. 89-742

In the Supreme Court of the United States

OCTOBER TERM, 1989

JAMES A. LYNAUGH, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS, PETITIONER

v.

CARROLL F. YOUNGBLOOD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
WILLIAM C. BRYSON
Deputy Solicitor General
JAMES A. FELDMAN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the retroactive application of a purely procedural change in the law that does not render an otherwise innocent act criminal, increase the punishment for a crime, or deprive the defendant of any defense otherwise available violates the constitutional prohibition on *ex post facto* laws.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether a statute mandating a change in criminal procedure may be applied to the prosecution of crimes committed before the statute was enacted. The *Ex Post Facto* Clauses of the Constitution, Art. I, § 9, Cl. 3, and Art. I, § 10, Cl. 1, apply to both the federal government and the States. The United States therefore has a significant interest in the resolution of this case, which may shed light on the question of when statutes that affect the conduct of criminal trials may be applied retroactively.

STATEMENT

1. Under Texas criminal procedure, the defendant has a right to have the jury, rather than the court, determine punishment after a verdict of guilty has been returned. Tex. Code Crim. Proc. Ann. art. 37.07 (Vernon 1981 & Supp. 1990). In accordance with this provision, after respondent was convicted of aggravated sexual abuse, a jury trial was held on the issue of punishment. The judge instructed that respondent could be sentenced to prison for not less than 15 nor more than 99 years, and that respondent could be fined up to $10,000. Pet. App. B1. The jury assessed punishment of life imprisonment and a $10,000 fine. The jury returned its verdict on March 17, 1982. Pet. App. D2.

On November 23, 1983, the Texas Court of Criminal Appeals decided *Bogany* v. *State*, 661 S.W.2d 957 (en banc), in which it held that the Texas legislature had not authorized a monetary fine to be assessed under Tex. Penal Code Ann. § 12.42(c) (Vernon 1974), the sentencing provision under which the *Bogany* defendant, as well as respondent, had been sentenced. The court found that, because Texas law did not grant authority to appellate courts to reform a jury verdict, the only remedy for the unauthorized fine was to remand the case for a new trial, at which the jury would be instructed that no fine could be assessed. 661 S.W.2d at 959. See also *Ex parte Johnson*, 697 S.W.2d 605 (Tex. Crim. App. 1985).

On August 13, 1984, respondent's conviction was affirmed in an unpublished opinion. Pet. App. C1. On September 19, 1984, respondent filed an application for a writ of habeas corpus, relying on the *Bogany* case. On April 2, 1985, the trial court recommended that the writ issue.[1] Pet. App. A1-A2. On June 11, 1985, however, a

[1] Under Texas law, only the Court of Criminal Appeals may grant a writ of habeas corpus. Tex. Code Crim. Proc. Ann. art. 11.07 (Vernon 1977 & Supp. 1990).

statute went into effect to remedy the problem created by *Bogany*. The statute provided that if a jury assesses a punishment that is authorized by law and a punishment that is not authorized by law, the trial or appellate court shall "reform the verdict to show the punishment authorized by law and omit the punishment not authorized by law." Tex. Code Crim. Proc. Ann. art. 37.10(b) (Vernon Supp. 1990). Therefore, on October 16, 1985, the Texas Court of Criminal Appeals applied the new statute to respondent's case, denied respondent's petition for a writ of habeas corpus, and reformed the verdict to omit the $10,000 fine. Pet. App. B1-B4.

Respondent then sought a writ of habeas corpus from a federal district court. He alleged that applying Article 37.10(b) to his case violated the constitutional prohibition on *ex post facto* laws.[2] The district court denied the petition, holding that "the retroactive application [of Article 37.10(b)] * * * does not criminalize and punish a prior action, aggravate a crime * * *, inflict a greater punishment, nor alter the legal rules of evidence," and therefore "does not fall within the classic definition of an *ex post facto* law." Pet. App. C5-C6.

The Fifth Circuit reversed. The court rejected the State's argument that a statute cannot violate the *Ex Post Facto* Clauses unless it punishes as a crime a previously innocent

[2] In both the district court and the court of appeals, the State argued that respondent had not exhausted his state remedies. Both courts rejected this argument, on the ground that it was clear after the decisions of the Court of Criminal Appeals in *Ex parte Johnson*, 697 S.W.2d 605 (Tex. Crim. App. 1985), and in respondent's own case that any further recourse to state remedies would be futile. See Pet. App. C3-C4, D3-D4. The petition for a writ of certiorari does not renew the contention that respondent failed to exhaust state remedies.

act, makes more burdensome the punishment of a crime after its commission, or deprives the defendant of a defense available at the time the act was committed. Pet. App. D7. Instead, the court ruled that even "statutes regulating procedure will violate the *Ex Post Facto* clause if they deprive the defendant of a 'substantial right given to him by the law in force at the time to which his guilt relates.' " Pet. App. D6 (quoting *Thompson* v. *Utah,* 170 U.S. 343, 352 (1898)). Thus, because there was no dispute that Article 37.10(b) was applied retrospectively in this case, the "salient issue," as the court of appeals saw it, was simply whether "the law operated to disadvantage the accused in the exercise of a substantial right or protection that he previously enjoyed." Pet. App. D8. Because, in the court's view, the statute "altered [respondent's] right to retrial—a substantial right—to his material disadvantage," the court of appeals directed that respondent be afforded a new trial. Pet. App. D10.

Judge Jones wrote a concurring opinion in which she suggested that the distinction between "mere modes of procedure" that may be applied retrospectively and "substantial or vital protections" that may not is "a wobbly one." Pet. App. D10. She noted that, if the *Ex Post Facto* Clauses bar even those " 'procedural' changes that do not affect the traditional *ex post facto* concerns," she could find no "overriding principle" on which to disagree with the panel's decision. Pet. App. D12. Judge Gee also wrote a brief concurring opinion. Agreeing with Judge Jones' observations concerning the "modes of procedure" cases, he observed that the cases "constitute[ ] more of a bright spectrum than a bright line." Pet. App. D10.

SUMMARY OF ARGUMENT

The constitutional prohibition of *ex post facto* laws is a limitation only on statutes that on their face or in effect retrospectively define crimes or prescribe punishments. Although statutes labeled "procedural" may fall within the proscription, they do so only when they operate retrospectively to alter the definition of a crime, to restrict the scope of a defense, or to increase the prescribed punishment. Accordingly, this Court has routinely upheld retrospective application of procedural changes, regardless of whether they disadvantage defendants in particular cases.

The statute at issue in this case was on its face and in effect a procedural statute. It did not on its face or in effect modify the definition of any crime or change the prescribed punishment for any crime. The statute simply granted appellate courts the authority to correct certain kinds of errors in criminal judgments. By enlarging the authority of the appellate courts, the statute denied respondent the windfall of a new trial that he would have obtained under prior procedures. As such, the case is governed by this Court's decision in *Mallett* v. *North Carolina,* 181 U.S. 589 (1901), which held that retrospective application of a statute that enlarged the scope of appellate review was constitutional.

To permit retrospective application of the Texas statute does no violence to the values underlying the *Ex Post Facto* Clauses. Because the new statute did not alter the definition of respondent's crime or the punishment prescribed for it, Texas law gave respondent fair warning; he could therefore have had no reliance interest in the unusual Texas procedural rules that were in effect at the time he committed the crime. Nor did the enactment of a

procedural remedy such as the statute at issue here, applicable to a wide range of different cases, threaten arbitrary or vindictive action by the legislature to punish a particular unpopular individual or group.

ARGUMENT

THE *EX POST FACTO* CLAUSES OF THE CONSTITUTION DO NOT PROHIBIT RETROSPECTIVE APPLICATION OF THE PROCEDURAL STATUTE AT ISSUE IN THIS CASE.

A. The Constitutional Prohibition Of *Ex Post Facto* Laws Extends Only To Statutes That On Their Face Or In Effect Retrospectively Alter The Definition Of Crimes Or The Prescription Of Punishments.

In an oft-quoted passage in his opinion in *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798), Justice Chase enumerated the legislative acts that fall within the prohibitions of the *Ex Post Facto* Clauses of the Constitution:

> "1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*."

3 U.S. at 390 (emphasis in original). Aside from the fourth category, which is not at issue in this case,[3] the prohibition

[3] Insofar as the fourth category is seen to prohibit the application of new evidentiary rules to cases involving conduct that occurred before the new rules were promulgated, it has been overtaken by succeeding cases. See, *e.g.*, *Thompson* v. *Missouri*, 171 U.S. 380 (1898) (retroactive application of statute making admissible handwritten documents as handwriting exemplars held constitutional); *Hopt* v. *Utah*, 110 U.S. 574, 588-590 (1884) (retroactive application of statute making felons competent to testify at trial held constitutional).

of *ex post facto* laws focuses on legislative changes in the definition of crimes, punishments, and defenses. The court of appeals erred in mistaking the narrow constitutional prohibition of *ex post facto* legislation for a broad-ranging proscription of any change in the legal system that may adversely affect a defendant whose criminal conduct took place before the change was made. This drastic expansion of the scope of the *ex post facto* prohibition, which is not supported by this Court's cases and which would cause substantial confusion and disuniformity in the administration of the criminal law, should be rejected.

1. Although the *Calder* v. *Bull* explanation has been formulated in slightly different ways in later cases, the Court has consistently placed central emphasis on the core prohibition of retrospective changes in either the definition of crimes (and available defenses) or the severity of punishments. See, *e.g.*, *Beazell* v. *Ohio*, 269 U.S. 167, 169 (1925); *Rooney* v. *North Dakota*, 196 U.S. 319, 325 (1905); *Duncan* v. *Missouri*, 152 U.S. 377, 382 (1894); *Gut* v. *State*, 76 U.S. (9 Wall.) 35 (1869).

It is true, as the court of appeals noted, that the prohibition is not limited to statutes that on their face modify definitions of particular crimes and the punishments specified for them. See Pet. App. D6-D8. For example, in *Beazell* v. *Ohio*, the Court noted that "there may be procedural changes which operate to deny to the accused a defense available under the laws in force at the time of the commission of his offense, or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition." 269 U.S. at 170. See also

Miller v. *Florida*, 482 U.S. 423, 433 (1987); *Weaver* v. *Graham*, 450 U.S. 24, 29 (1981). Yet, statements that procedural changes can be within the reach of the *Ex Post Facto* Clauses have generally been coupled with recognition that the Clauses were not intended to limit "legislative control of remedies and modes of procedure which do not affect matters of substance." *Beazell*, 269 U.S. at 171; see also *Miller*, 482 U.S. at 433; *Dobbert* v. *Florida*, 432 U.S. 282, 293 (1977). The Court's cases certainly do not support the view that the *Ex Post Facto* Clauses prohibit all retrospective procedural changes that might operate to the detriment of a criminal defendant.

In short, although there may be procedural changes that require scrutiny under the *Ex Post Facto* Clauses, the purpose of such scrutiny ordinarily is to determine whether such changes, although labeled "procedural," in fact operate to modify the definitions of crimes and punishments. Similarly, although there may be cause to inquire for purposes of the *ex post facto* prohibition whether procedural changes "affect matters of substance," the "matters of substance" at issue are those that are the special concern of the *Ex Post Facto* Clauses—changes in legislative definitions of crimes and defenses and prescriptions of punishment.

2. The Court has routinely upheld retrospective application of procedural changes when those changes did not on their face or in effect modify definitions of crimes or punishments. For example, the Court has sanctioned the retrospective application of a statute that eliminated a criminal defendant's right to insist on a severance from his co-defendants, *Beazell* v. *Ohio*, 269 U.S. 163 (1925), and it has upheld statutes that reversed evidentiary rules that had rendered handwriting exemplars inadmissible, *Thompson* v. *Missouri*, 171 U.S. 380 (1898), or made convicted felons incompetent to testify, *Hopt* v. *Utah*, 110 U.S. 574, 588-

590 (1884). Similarly, the Court has upheld statutes that changed the qualifications of jurors, *Gibson* v. *Mississippi*, 162 U.S. 565 (1896), modified the composition of appellate panels, *Duncan* v. *Missouri*, 152 U.S. 377 (1894), and gave the State a right to appeal adverse decisions of an intermediate appellate court, *Mallett* v. *North Carolina*, 181 U.S. 589, 592-597 (1901).

The Court's most recent precedent dealing with an *ex post facto* challenge to procedural changes, *Dobbert* v. *Florida*, 432 U.S. 282 (1977), is consistent with this line of cases. In *Dobbert*, the Court upheld a new death-penalty sentencing statute that substantially altered the division of responsibility between judge and jury for imposing the death sentence.

Any of the changes at issue in this line of cases could determine whether a particular defendant is found innocent or guilty, or could, as in *Dobbert*, dramatically affect his punishment. Nonetheless, because none of them on their face or in effect modified the definitions of crime or the legislative prescriptions of punishment, all of them were held to be "procedural," and therefore not in violation of the *Ex Post Facto* Clauses.

The court of appeals relied primarily on *Thompson* v. *Utah*, 170 U.S. 343 (1898), to support its conclusion that the *Ex Post Facto* Clauses forbid retrospective application of procedural statutes. See Pet. App. D6. By generalizing from that unusual case, the court erred. *Thompson* arose at the time Utah was undergoing a change in status from Territory to State. While Utah was a Territory, defendants were entitled to a jury of 12; when it became a State, a local statute limited the jury's size to eight persons. The Court held that the right to a 12-person jury that obtained during the territorial period was required by the Sixth Amendment, and that a person who committed a crime

during that period could not be tried by a jury of less than 12.[4]

The *Thompson* Court was plainly concerned with the state statute's impact on the defendant's Sixth Amendment right to trial by jury at a time long before *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), which applied that right to the States. The Court's analysis is premised on its view that the Utah statute eliminated a "right that was regarded, at the time of the adoption of the Constitution, as vital for the protection of life and liberty, and which he enjoyed at the time of the commission of the offense charged against him." 170 U.S. at 352. The issue that the Court found to be presented in *Thompson*—a procedural change that deprived the defendant of a constitutional right he had previously enjoyed—arose only because of the unusual circumstances of that case and is unlikely to recur. For that reason, *Thompson* should not be given broad application to modern *ex post facto* claims. This case, for example, has none of the constitutional overtones that animated the Court's analysis in *Thompson*.

The other cases on which the court of appeals relied similarly provide no support for a broad extension of the prohibition of *ex post facto* laws to preclude retrospective application of procedural statutes. *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277 (1866), and *Ex parte Garland*, 71

[4] The Court's assumption that the Sixth Amendment requires a 12-person jury has been undercut by *Williams* v. *Florida*, 399 U.S. 78 (1970). Insofar as the *Thompson* Court relied on that assumption, its result may not survive *Williams* in any event. Cf. *Ballew* v. *Georgia*, 435 U.S. 223, 230 (1978) (opinion of Blackmun, J.) (*Thompson* was "set to one side" in *Williams*). See also *State* v. *McIntosh*, 23 Ariz. App. 246, 532 P.2d 188 (Ct. App. 1975); *State* v. *Maresca*, 173 Conn. 450, 453, 377 A.2d 1330, 1332-1333 (1977); *Iseton* v. *State*, 472 N.E.2d 643, 650-653 (Ind. App. 1984). But see *McSears* v. *State*, 247 Ga. 48, 48-52, 273 S.E.2d 847, 848-850 (1981).

U.S. (4 Wall.) 333 (1866), involved post-Civil War legislation disabling individuals from following certain professions unless they took oaths that they had not engaged in or encouraged armed aggression against the United States. To be sure, neither statute directly related to the definition of crimes or the prescription of punishments, as the court of appeals recognized. Pet. App. D8. Yet, both statutes imposed a penalty—the deprivation of the right to pursue one's occupation—that was seen as comparable to a criminal sanction. *Cummings*, 71 U.S. (4 Wall.) at 327-328; *Garland*, 71 U.S. at 377-378. See *Burgess* v. *Salmon*, 97 U.S. 381, 385 (1878). Thus, both cases fall well within the traditional proscription of retrospective application of statutes defining criminal conduct and punishment. Because neither case involved a statute that could reasonably be characterized as "procedural," neither statute lends any support to the result the court of appeals reached in this case.[5]

Finally, the court of appeals correctly cited two recent cases for the proposition that two elements—retrospectivity and disadvantage to the defendant—are "critical * * * for a law to fall within the *ex post facto* prohibition." Pet. App. D4 (citing *Miller* v. *Florida*, 482 U.S. 423 (1987), and *Weaver* v. *Graham*, 450 U.S. 24, 29 (1981)).

[5] *Kring* v. *Missouri*, 107 U.S. 221 (1882), is sometimes seen as involving a "procedural" statute barred by the *Ex Post Facto* Clauses. In *Kring*, the Court held that a statute eliminating a rule that a guilty plea to a second-degree murder was an acquittal of first-degree murder could not be applied retrospectively. Yet, as the Court later explained, the question in *Kring* was "whether the statute of Missouri deprived the defendant of any right of defence which the law gave him when the act was committed." *Thompson* v. *Missouri*, 171 U.S. 380, 384 (1898). Thus, the *Kring* result is best seen as an instance of the ban on retrospective removal of defenses, a traditional concern closely related to the general proscription of retrospective changes in the definition of criminal conduct. See generally *Thompson*, 171 U.S. at 383-384.

Yet, although both of these elements are essential for a law to be held unconstitutional as *ex post facto*, neither case stands for the broad proposition that retrospectivity and disadvantage to the defendant are sufficient, without more, to render a procedural statute unconstitutional.

In *Weaver*, the Court held that a statute reducing the amount of automatic "gain time" to which a prisoner is entitled may not be applied retrospectively. The case clearly involved provisions affecting either the length of time the prisoner would serve or the conditions of his confinement. See 450 U.S. at 32. The statute thus fell directly within the *Calder* v. *Bull* proscription of any law that "*changes the punishment*, and inflicts a greater punishment, than the law annexed to the crime, when committed." 3 U.S. (3 Dall.) at 390 (emphasis in original).

In *Miller*, the Court held invalid retrospective application of changes in the State's sentencing guidelines that attached a stiffer presumptive sentence to the defendant's crime. The analysis in *Miller* further emphasizes the need to focus on definitions of crimes and prescriptions of punishment in cases raising *ex post facto* challenges. The Court's conclusion that retrospectivity and disadvantage to the defendant are the critical elements in determining whether application of the new sentencing guidelines was constitutional does not lead to the conclusion that retrospectivity and disadvantage alone—in a case in which a change in prescribed sentences is not at issue—are sufficient to invalidate application of a statute. The Court made quite plain that "no *ex post facto* violation occurs if the change in the law is merely procedural and does 'not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt.' " 482 U.S. at 433 (quoting *Hopt* v. *Utah*, 110 U.S. 574, 590 (1884)). Although the Court recognized that a statute that "takes a seemingly procedural form" may operate to increase punishment or change the ingredients of the offense, *ibid.*, the Court did not in any way suggest that procedural changes that do not have those effects may not be applied retrospectively.

In short, the test for an *ex post facto* violation, derived from this Court's cases over the past 175 years and only recently restated in *Miller*, focuses on changes in the definitions of crime and prescriptions of punishment. If a statute explicitly changes the definition of a crime or the prescription of punishment for criminal conduct, it may not be applied retrospectively if it substantially disadvantages the defendant. If a statute appears to be procedural, but in effect operates to change the definition of a crime or the prescription of punishment, it too may be unconstitutional under similar conditions. But if a statute is procedural in nature and does not operate to change the definition of a crime or the prescription of punishment, it fits squarely within the ordinary rule that a court should apply the law as it finds it. See *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974); *Thorpe* v. *Housing Authority*, 393 U.S. 268, 281 (1969); *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801).

B. Because The Statute At Issue Here Does Not Alter The Definition Of Any Crime Or The Prescription Of Any Punishment, Its Retrospective Application To Respondent's Case Is Constitutional.

1. Because the statute at issue here—Article 37.10(b) of the Texas Code of Criminal Procedure—is a legislative change relating to the allocation of responsibility for correcting a trial error, it is appropriately categorized as a "procedural" statute for purposes of the *ex post facto* prohibition. The statute does not on its face or in effect change in any way the conduct that is deemed criminal under Texas law, nor does it alter the punishment pre-

scribed for such conduct. Therefore, it may be applied in the adjudication of cases involving criminal conduct that occurred prior to its enactment.

Article 37.10(b) was intended to address the problem created by the decision of the Texas Court of Criminal Appeals in *Bogany* v. *State*, 661 S.W.2d 957 (1983) (en banc). Like respondent, the defendant in *Bogany* had been convicted of a serious felony and sentenced by the jury to a term of imprisonment and a $10,000 fine, despite the fact that Texas law did not authorize a fine for his offense. The *Bogany* court held that under Texas law "[t]he authority of a court on appeal to reform the judgment and sentence does not extend to the situation" in which the verdict was "unauthorized by law." 661 S.W.2d at 958. See also *Ex parte Johnson*, 697 S.W.2d 605, 607 (Tex. Crim. App. 1985). Because there was no way to correct the verdict, the case was remanded for a new trial.

As set forth in *Bogany*, Texas law prior to the enactment of Article 37.10(b) gave the courts extremely limited authority with respect to punishment imposed by a jury. The courts apparently had authority only to enter the sentence precisely as determined by the jury, or to reverse the sentence and remand for an entirely new trial if any element of the sentence was illegal. The judgment could not be modified to eliminate the unauthorized element of the punishment while keeping the valid portion of the judgment intact. See *Bogany*, 661 S.W.2d at 958.

A new trial in the *Bogany* situation was required simply because no judicial body had authority to correct erroneous sentences. The *Bogany* rule thus resulted in a pure windfall to the defendant.[6] He obtained another opportunity to be found innocent, despite the fact that there was no error claimed with respect to the jury's determination of guilt. In addition, he gained another opportunity to obtain a shorter sentence of imprisonment, despite the fact that there was no infirmity claimed with respect to the jury's determination of the appropriate term of imprisonment. The new trial could proceed exactly as the old trial, with the same evidence, the same arguments, and the same instructions; the sole difference in the trials was that the jury at the second trial would not be instructed that it could impose a fine, and presumably would not do so.

Article 37.10(b) eliminated that windfall by granting the courts authority to conform a jury's sentence to law, in circumstances in which one element of the punishment assessed by the jury is unauthorized. In so doing, the statute simply enlarged the scope of appellate review and, in particular, added an additional remedy to correct an unauthorized verdict. It was never a part of the punishment prescribed for respondent's crime that, if the jury assesses a punishment one of whose elements is unauthorized by law, the perpetrator is entitled to another opportunity to prove his guilt. Both before and after the change, the punishment authorized for respondent's crime was 15 to 99 years' imprisonment. In addition, both before and after the change, respondent was entitled to have his sentence within that range determined by a jury, and it was so determined.

2. Because Article 37.10(b) affects only the law of remedies—and in particular the allocation of authority for

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[6] Indeed, the legislature's decision to enact Article 37.10(b) remedied a dangerous disincentive to correct trial error created by the *Bogany* decision. A defendant who knew that the trial court would instruct the jury that it could assess a punishment that was in fact unauthorized would be expected not to object and, indeed, to encourage submission of the faulty instruction. For if the instruction was submitted and the defendant convicted, the defendant would automatically gain the right to a new trial and, thus, a new opportunity to have a jury find him innocent.

correcting trial errors—application of the statute in this case is strongly supported by the numerous cases recognizing that changes in the remedies available for correcting trial defects are procedural and thus may be applied retrospectively. See, *e.g.*, *Dobbert* v. *Florida*, 432 U.S. 282, 293 (1977); *Beazell* v. *Ohio*, 269 U.S. 167, 171 (1925) (*Ex Post Facto* Clauses not intended "to limit the legislative control of remedies"); *Thompson* v. *Missouri*, 171 U.S. 380, 386 (1898) ("Remedies must always be under the control of the legislature."); *Gibson* v. *Mississippi*, 162 U.S. 565, 590 (1896). Of particular relevance is *Mallett* v. *North Carolina*, 181 U.S. 589 (1901). In *Mallett*, the intermediate state appellate court overturned the defendant's conviction. Although at the time of the crime the State did not have authority to take an appeal from the intermediate appellate court to the state Supreme Court, the State relied on a newly enacted statute to take such an appeal. This Court held that, despite the fact that applying the new statute would plainly operate to the disadvantage of the defendant, the statute was not an *ex post facto* law within the meaning of the constitutional prohibition. 181 U.S. at 597.[7]

The reasoning of the court of appeals contradicts this Court's holding in *Mallett*. The court of appeals applied a test under which *any* retrospective change that "material-[ly] disadvantage[d]" the defendant or denied him a "substantial 'protection' " was prohibited, regardless of whether it affected the definition of the crime or the legislatively prescribed punishment. Pet. App. D9. But the right to an acquittal that the *Mallett* defendant would have received under prior law is certainly more "substantial" than "the right [at issue in this case] to have one's guilt

[7] *Mallett* was recently applied in *Nilson Van & Storage Co.* v. *Marsh*, 755 F.2d 362 (4th Cir.), cert. denied, 474 U.S. 818 (1985).

retried before a different jury—with its attendant possibility that the outcome might be different the second time around." *Ibid.* Thus, the decision of the court of appeals in this case cannot be reconciled with this Court's decision in *Mallett*.

In both *Mallett* and this case, prior law gave the defendant a windfall when certain types of errors occurred. In *Mallett*, the windfall arose when an intermediate appellate court erroneously overturned a conviction, while in this case it arose when the jury erroneously assessed an unauthorized punishment. In both cases, a statute enacted after the date of the defendant's crime gave the State a new remedy for error—appeal to the state Supreme Court in *Mallett*, reformation of the verdict in this case—that had not existed under prior law. The Court's decision in *Mallett* should therefore control the result in this case.

3. Applying Article 37.10(b) to respondent's case is consistent with the values underlying the *Ex Post Facto* Clauses. Most important of those values is the need "to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver* v. *Graham*, 450 U.S. 24, 28-29 (1981). See also *Miller* v. *Florida*, 482 U.S. 423, 430 (1987); *Dobbert* v. *Florida*, 432 U.S. 282, 297-298 (1977). It cannot reasonably be argued that respondent, or any other individual, relied in any way on the *Bogany* quirk in Texas procedural law before undertaking his criminal conduct. Both before and after the enactment of Article 37.10(b), Texas law gave precisely the same answer to the question whether respondent's conduct was criminal and what punishment ought to be prescribed for that conduct. Therefore, application of Article 37.10(b) in this case

in no way deprived respondent of fair warning or intruded upon any reasonable reliance interest.

The other important value underlying the *Ex Post Facto* Clauses is the need for protection against the danger of arbitrary and vindictive legislation. *Miller* v. *Florida,* 482 U.S. at 430; *Weaver* v. *Graham,* 450 U.S. at 29 (citing cases). In this case, however, there is no reason to believe that the State legislature, in enacting Article 37.10(b), intended to do anything other than remedy a legal anomaly without prejudicing any substantial right of any defendant. As with procedural changes generally, the breadth of their application militates against any suggestion that either animus toward particular defendants or the use of the criminal law as a pretext to deprive disfavored individuals of their liberty underlay enactment of the statute.

As the *Mallett* Court recognized, "it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice * * * in existence when its facts arose." 181 U.S. at 596-597 (citation omitted). Defendants do not have a vested right in every important aspect of the procedural system in effect at the time the crime was committed. Because the decision of the court of appeals would create just such a right out of the Constitution's *ex post facto* prohibitions, it should be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
WILLIAM C. BRYSON
Deputy Solicitor General
JAMES A. FELDMAN
Assistant to the Solicitor General

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

JAMES A. COLLINS, Director,
Texas Department of Corrections,
Petitioner,

v.

CARROLL F. YOUNGBLOOD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF WILBERT LEE EVANS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

ARTHUR F. MATHEWS *
THOMAS F. CONNELL
MARK D. CAHN
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000
Counsel for Amicus Curiae

* Counsel of Record

February 26, 1990

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QUESTIONS PRESENTED

1. Whether it violates the *ex post facto* clause of the United States Constitution retroactively to apply a penal statute which validates a verdict that was void and unenforceable under the law in place when the offense was committed and the verdict was rendered.

2. Whether it violates the *ex post facto* clause of the United States Constitution retroactively to apply a penal statute which deprives a defendant of an absolute defense to imposition of punishment available under the law in place when the offense was committed and the verdict was rendered.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-742

JAMES A. COLLINS, Director,
Texas Department of Corrections,
Petitioner,

v.

CARROLL F. YOUNGBLOOD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF WILBERT LEE EVANS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE WILBERT LEE EVANS*

This case presents the question of whether a state statute may retroactively deprive a criminal defendant of the right, guaranteed by the law in place at the time of his offense and trial, to an order vacating any finding of guilt and prohibiting the imposition of punishment upon proof of error in the jury's verdict. Wilbert Lee Evans ("Evans") is a capital prisoner in the Commonwealth of

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* Written consent to the filing of this brief has been obtained from the parties to this case. The consent letters accompany this brief.

Virginia whose Petition for a Writ of Certiorari, now pending before this Court, raises a similar question.[1]

Evans was tried, convicted and sentenced to death in April 1981 for an offense that occurred in January 1981. The capital sentencing statute in place at the time of Evans' offense, trial, sentencing, and direct appeal gave the prosecution one and only one opportunity to obtain a death sentence: "[I]f the Commonwealth failed to secure a death sentence due to errors in the sentencing process it was foreclosed from seeking capital resentencing and the defendant received an automatic sentence of life imprisonment." *Evans v. Thompson*, 881 F.2d 117, 119 (4th Cir.), *cert. pending*, No. 89-516 (filed Sept. 27, 1989).[2]

A full year after Evans' conviction and death sentence had become final, Virginia enacted an emergency amendment to its capital sentencing statute which repealed the prior law and authorized for the first time capital resentencing for those cases in which a capital sentence was set aside for error. Less than three weeks later, the Commonwealth confessed error and moved to vacate Evans'

[1] *See Evans v. Thompson*, 881 F.2d 117 (4th Cir.), *cert. pending*, No. 89-516 (filed Sept. 27, 1989). Evans' petition presents four additional questions: (1) whether imposition of the death sentence upon resentencing in his case violated the equal protection clause of the United States Constitution; (2) whether the Commonwealth violated Evans' right to the due process of law by failing to disclose known prosecutorial misconduct for two years, until Virginia had enacted emergency legislation authorizing for the first time capital resentencing; (3) whether Evans was denied the effective assistance of counsel during the course of his direct appeal; and (4) whether Evans was denied the due process of law by the trial court's erroneous suggestion, in response to a specific jury question, that a split decision would not automatically result in a sentence of life imprisonment, when in fact state law mandated that it would.

[2] *See also Patterson v. Commonwealth*, 222 Va. 653, 283 S.E.2d 212 (1981). Similarly, Virginia law mandated that the defendant receive an automatic sentence of life imprisonment if the jury failed to reach unanimous agreement in the sentencing phase. *See* Va. Code § 19.2-264.4(E) (1983).

death sentence, admitting that the sentence rested on evidence that was " 'seriously misleading' or 'otherwise defective.' " [3] Over objection, Evans was resentenced under the new statute, and received the death sentence.

Evans' claim, like Youngblood's, is that he was entitled to the disposition mandated by the earlier law—which for Evans would have been a sentence of life imprisonment without parole. In Youngblood's case, the new law meant the difference between innocence and guilt; in Evans' case, the difference is between life and death.

STATEMENT

The facts of Youngblood's offense are not in dispute and, despite their questionable relevance, have been set out in detail by petitioner in its brief. At the same time, petitioner ignores a body of historical fact concerning Texas law which is of critical importance to the proper determination of the *ex post facto* issue before the Court. Properly considered, those historical facts refute the notion, central to petitioner's argument, that Youngblood's right to a new trial was a "quirk in state law" and "a mere fortuity with no basis in law or logic." [4]

For over 125 years, Texas law unequivocally provided that any jury verdict which assessed an unauthorized punishment was void at its inception; and that whenever judgment was entered on such a verdict, the defendant was entitled to a new trial on all issues. In 1856, the Texas legislature adopted its first Code of Criminal Procedure. Article 626 of the Code, which remained virtually unchanged until 1965, provided defendants with a right

[3] The Virginia Supreme Court later strongly criticized the prosecutor for his "indifferent, careless" conduct in introducing at Evans' capital sentencing hearing evidence that the prosecutor knew was seriously flawed. *See Evans v. Commonwealth*, 228 Va. 468, 323 S.E.2d 114, 117, 120 (1984), *cert. denied*, 471 U.S. 1025 (1985).

[4] *See* State of Texas' Petition for Writ of Certiorari at 13 (filed Nov. 18, 1989) (hereafter "Petition for Writ of Certiorari").

to have a jury assess both guilt and punishment in a unitary verdict.[5] The Texas courts construed this legislation as providing defendants with an absolute protection from the imposition of punishment if the jury's verdict was incomplete, erroneous, or otherwise unauthorized in any respect. Thus, if the jury returned a finding of guilt, but failed to assess punishment, the determination as to guilt was rendered void; such a verdict would be "but a dead letter, a nullity to which nothing could give force or vitality." [6]

Similarly, if the jury failed to provide both elements of the verdict with the proper degree of specificity—or assessed a punishment in excess of, or different from, that authorized by law—the verdict was rendered invalid in its entirety, and the defendant was entitled to a new trial. *Buster v. State*, 42 Tex. 315, 320 (1875). Although the courts sometimes questioned the wisdom of a legislative policy that nullified an entire verdict (thereby returning the defendant to liberty) because of errors in only one portion of it,[7] they nevertheless enforced that policy with uncompromising rigor.[8] And they insisted

[5] Article 626 provided, in pertinent part, that the jury "must find that the defendant is either 'guilty' or 'not guilty;' and, in addition thereto they shall assess the punishment in all cases where the same is not absolutely fixed by law, to some particular penalty." Tex. Code Crim. Proc. art. 626 (1856). That section became Article 693 when the Code was revised in 1925, but otherwise remained essentially unchanged.

[6] *Wooldridge v. State*, 13 Tex. Crim. 443, 457 (1883). The court further observed that under such circumstances, no court would be "authorized or warranted in holding the verdict sufficient, and in supplying the deficiency and awarding a punishment commensurate with the finding . . . ." *Id.*

[7] *See Buster v. State*, 42 Tex. at 320.

[8] *See, e.g., Wooldridge v. State*, 13 Tex. Crim. 443 (1883) (judgment reversed where jury found defendant guilty of "fist" degree murder, instead of "first" degree murder); *Evans v. State*, 35 Tex. Crim. 485, 487 (1896) (new trial ordered where jury sentenced defendant to "reform school" and statute authorized punishment only in the "penitentiary" or in the "house of correction and reformatory"); *Shackelford v. State*, 277 S.W.2d 695 (Tex. Crim. App. 1925) (judgment reversed, and new trial ordered, where trial court sought to rectify improper instruction concerning permissible range of punishments by lowering punishment assessed by jury to minimum level permitted by law; even though the reformed verdict was more advantageous to the defendant than the original erroneous one, the defendant was still entitled to have entire verdict set aside). In subsequent cases, the Texas courts have forgiven obvious grammatical errors in otherwise valid verdicts, *see, e.g., Wilkes v. State*, 237 S.W.2d 991, 992 (Tex. Crim. App. 1951); however, the courts continued to invalidate the entire verdict whenever any portion of it was unauthorized or erroneous. *See* discussion in text at 6-7.

that any change in the law must come from the legislature.[9]

In 1965 and 1967, the Texas legislature made fundamental changes to the Criminal Code (hereafter, the "1967 amendments"); but at the same time it elected to continue, rather than change, the century-old rule voiding an entire jury verdict for errors in the penalty phase. That decision was all the more significant because among the amendments, Texas abolished the requirement of a unitary verdict on both guilt and punishment, and established the current, bifurcated proceeding. The 1967 amendments allowed the defendant to elect whether to have punishment imposed by judge or by jury; if the defendant chose the latter, he was entitled to the same protections afforded by the 1856 Code.[10] Specifically, the

[9] *See Buster v. State*, 42 Tex. at 320.

[10] The 1967 amendments provided no similar protections to defendants who elected to have punishment determined by the court; if an error occurred in a judge's sentencing, it could be corrected without impairing the finding of guilt. *See King v. State*, 710 S.W.2d 110, 114 (Tex. Crim. App. 1986), *cert. denied*, 484 U.S. 829 (1987) (where trial court assessed unauthorized punishment, Court of Appeals can set aside sentence, and remand for new hearing on punishment); *Tyra v. State*, 534 S.W.2d 695, 698 (Tex. Crim. App. 1976), *ovrld. on other grounds, Cooper v. State*, 631 S.W.2d 508 (Tex. Crim. App. 1982).

amendments required that the "punishment . . . be assessed by the *same* jury" that determined guilt.[11] In addition, whenever the defendant elected to have punishment imposed by jury, the verdict "shall not be complete until the jury has rendered a verdict both on the guilt or innocence of the defendant and the amount of punishment, where the jury finds the defendant guilty." [12] Finally, the amendments provided that where the jury failed to agree on either portion of the verdict, "a mistrial shall be declared, the jury shall be discharged, and no jeopardy shall attach." [13]

At the same time that the Texas legislature chose to reconfirm the important protections provided by the prior law, they chose not to give the appellate courts any power to reform or modify punishment assessed by a jury. *See* Tex. Code Crim. Proc. Ann. art. 44.24(b) (Vernon 1979). The courts themselves recognized this limitation, and lamented it: "The Legislature . . . never [saw] fit to give [the] Court [of Criminal Appeals] or any intermediate appellate Court of [Texas] authority to assess punishment or reduce punishment assessed by a jury where the conviction was for a non-capital felony." *Bogany v. State*, 661 S.W.2d 957, 959 (Tex. Crim. App. 1983) (en banc) (Teague, J., concurring).

For the past two decades, Texas courts have interpreted the 1967 amendments in harmony with the protections afforded by the earlier Code. In an unbroken line of cases Texas courts have held that where punish-

[11] Tex. Code Crim. Proc. Ann. art. 37.07(2)(b)(2) (Vernon 1981) (emphasis added). By legislation effective September 1, 1985, this provision was amended to permit, for the first time, assessment of punishment by a different jury on retrial if the initial punishment was set aside for error. Acts 1985, 69th Leg., ch. 291, § 1, eff. Sept. 1, 1985. *See* Tex. Code Crim. Proc. Ann. art. 37.07(2)(b)(2) (Vernon Supp. 1990); art. 44.29(a) (Vernon Supp. 1990).

[12] Tex. Code Crim. Proc. Ann. art. 37.07(3)(c) (Vernon 1981 & Supp. 1990).

[13] *Id.*

ment was erroneously imposed by the jury, the case stood precisely in the same position as if the jury had failed to reach a verdict—and thus, in accordance with the statutory provisions set forth above, the *entire* verdict (of both guilt and punishment) was void from inception. *See, e.g., Ellison v. State*, 432 S.W.2d 955, 957 (Tex. Crim. App. 1968); *Ocker v. State*, 477 S.W.2d 288, 291 (Tex. Crim. App. 1972); *Smith v. State*, 479 S.W.2d 680, 681 (Tex. Crim. App. 1972); *Bogany v. State*, 661 S.W.2d at 959; *Ex parte Spaulding*, 687 S.W.2d 741 (Tex. Crim. App. 1985) (en banc).

Ex parte Spaulding is particularly instructive. In that case, the jury found the defendant guilty of aggravated sexual abuse, and sentenced the defendant to serve fifty years imprisonment and to pay a fine of $10,000. When the defendant collaterally attacked the verdict because it included, in addition to a term of imprisonment, a fine unauthorized by law, the state sought to cure the error by having the Governor of Texas remit the fine. The Texas Court of Criminal Appeals rejected that suggestion and vacated the entire verdict. In language that echoes an opinion issued one hundred years earlier, the court observed that the jury's unauthorized sentence rendered the entire verdict "void . . . absolutely null . . . [and] of no legal force and effect whatever . . . ." *Ex parte Spaulding*, 687 S.W.2d at 743 (citations omitted).[14] As the court held, "[s]uch judgment and sentence being void, the error is incurable and any subsequent attempt at remitting the fine portion of a void sentence is also void. . . . Even the Governor, with his constitutional powers, may not breathe new life into a 'dead' judgment." *Id.*

This was the law in effect at the time of the offense, trial, sentencing and direct appeal in the instant case. This law remained in effect for nearly a full year after

[14] *See Wooldridge v. State*, 13 Tex. Crim. App. at 457 (observing that a verdict of guilt, absent a jury determination of valid punishment, "would in fact be but a dead letter, a nullity to which nothing could give force or vitality").

Youngblood's conviction and sentence had become final. Effective June 11, 1985, Texas reversed its 129-year-old practice, by expressly authorizing the courts for the first time to reform erroneous jury verdicts by "omit[ting]" any portion of the punishment "not authorized by law for the offense." [15]

It is beyond dispute that the March 1982 verdict in the Youngblood case included a penalty "not authorized by law." Similarly, there is no question that Texas law at the time of that verdict mandated that the entire verdict rendered against Youngblood—including the jury's determination of guilt and assessment of punishment—was absolutely void, and that any attempt to revive the sentence and cure its defects was similarly void as a matter of law. *See Ex parte Spaulding*, 687 S.W.2d at 743; *Smith v. State*, 479 S.W.2d at 681. Absent the 1985 legislative amendment, Youngblood was entitled to an order vacating the jury's determination and prohibiting any punishment pursuant to the void and invalid conviction.[16]

SUMMARY OF ARGUMENT

From the earliest days of the Republic, this Court has construed the *ex post facto* clause of the United States Constitution [17] as prohibiting a wide array of retrospective statutes that have a substantial adverse impact on criminal defendants. Far from restricting application of the prohibition to only those statutes that fit neatly within a narrow, mechanistic formula, the Court has consistently taken an open-ended, pragmatic approach, prohibiting legislation that, regardless of its form, retroactively alters the substantial rights of criminal defendants. The only exceptions have been statutes that are

[15] Tex. Code Crim. Proc. Ann. art. 37.10(b) (Vernon Supp. 1990).

[16] To be sure, no jeopardy would attach in such circumstances. Thus, the state would retain the right to seek a retrial and punishment before a different jury.

[17] U.S. Const. Art. I, § 10, cl. 1.

purely procedural in both form and effect. They consist of neutral statutes which alter the rules governing how evidence is presented to the fact-finder, or the court responsible for hearing it, or involve similar changes that are evenhanded as between the defendant and the state.

The court below correctly applied these longstanding principles in finding that the *ex post facto* clause prohibited application of a Texas law which (although "procedural" in form) operated to deprive the defendant retroactively of his clear, statutory right to liberty. Applied retroactively, the Texas statute validated a previously void verdict, deprived the defendant of an absolute defense to punishment, and permitted the state to fashion and impose a sentence of life imprisonment that had been expressly forbidden by the law in place at the time of the defendant's offense and trial. Contrary to petitioner's assertions, the unanimous decision of the court below is entirely consistent with almost two hundred years of precedent set by this Court and the lower courts.

Finally, petitioner urges this Court to turn the clock back on two centuries of precedent, and to adopt, as a definition of rights protected by the *ex post facto* clause, an illustrative and historical list of abuses identified in the dicta of one Justice in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). Even if that approach is followed, the Texas statute involved here would still fall, because it retroactively eliminated a defense to the imposition of punishment that existed in law at the time of the offense and trial.

ARGUMENT

I. RETROACTIVE APPLICATION OF THE TEXAS STATUTE AT ISSUE HERE VIOLATED THE *EX POST FACTO* CLAUSE BECAUSE IT DEPRIVED THE DEFENDANT OF THE "SUBSTANTIAL RIGHT," MANDATED BY THE LAW IN PLACE AT THE TIME OF TRIAL, TO BE FREE FROM THE VERDICT OF GUILT AND PUNISHMENT RENDERED AGAINST HIM.

The fundamental assertion of both petitioner and amicus curiae the United States [18] is that the *ex post facto* clause should be construed narrowly in accordance with a "bright line" test. They claim that no retroactive penal legislation, no matter how detrimental to the defendant, violates the clause unless it does one of three things: alters the definition of a crime, restricts the scope of a defense, or increases the prescribed punishment.[19] Petitioner's restrictive reading of the clause has no historical support, and is fundamentally in error.

For nearly two centuries this Court has resisted adopting such a narrow, mechanistic approach to the *ex post facto* protection. The Court has instead recognized that the clause prohibits retroactive enforcement of a wide array of legislative acts that adversely affect the defendant. Many of the statutes struck down by this Court and the lower courts have a substantial adverse impact on the defendant, even though they take a "seemingly procedural form." *Miller v. Florida*, 482 U.S. 423, 433 (1987) (citation omitted). The Texas statute at issue here is precisely of that nature, and accordingly, cannot be applied retroactively.

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[18] The Brief of the United States as Amicus Curiae, filed January 25, 1990, will be referred to as "Brief of the United States."

[19] *See* Brief of the United States at 5; Petitioner's Brief at 7.

A. From the Beginning of the Republic, This Court Has Construed the *Ex Post Facto* Clause to Prohibit a Wide Array of Retrospective Legislation Which Has a Substantial Adverse Impact on the Defendant.

The command that a state shall pass no "*ex post facto* Law" [20] is a core constitutional protection that restrains the government from retroactively enforcing penal sanctions. That protection was enshrined in the body of the Constitution and has been recognized by this Court from the earliest days of the Republic. In *Calder v. Bull*, the first decision construing the clause, this Court recognized two great principles that have informed *ex post facto* jurisprudence in the next two centuries. First, the Court noted that the core purpose of the *ex post facto* clause is to restrain arbitrary and vindictive legislation: the clause is a "bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts, having a retrospective operation." [21] Second, the Court recognized that there is no easy formula for determining which specific legislative acts are prohibited. As Justice Chase noted, the clause on its face provides no guidance: it "necessarily requires some explanation; for, naked and without explanation, it is unintelligible, and means nothing." *Calder v. Bull*, 3 U.S. at 389.

In an oft-quoted dictum, Justice Chase provided some of the "explanation" by listing four examples of the kind of legislative acts that would violate the clause if applied retroactively.[22] But those examples, which were based on

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[20] U.S. Const. Art. I, § 10, cl. 1.

[21] *Calder v. Bull*, 3 U.S. at 389 (opinion of Chase, J.). In separate concurring opinions, Justices Paterson and Iredell likewise emphasized that the clause was aimed at preventing legislative abuses. *See id.* at 396 (Paterson, J.); *id.* at 399-400 (Iredell, J.).

[22] Although the entire discussion is illuminating, it is at bottom but the dicta of a single Justice. The Court's holding in *Calder v. Bull* is only that the *ex post facto* clause does not reach civil legislation, but is confined instead exclusively to penal statutes.

specific acts of Parliament universally regarded as repugnant,[23] were never intended to exhaust the possibilities.[24] In the sentence immediately following his list of examples, Justice Chase noted that the clause bars other, "similar laws" which, when applied retroactively, are "manifestly unjust and oppressive" to the defendant. According to Justice Chase, "[e]very law that takes away or impairs rights vested, agreeable to existing laws, is retrospective, and is generally unjust . . ."; and with the exception of statutes which "mollif[y] the rigor of the criminal law," retroactive penal legislation should generally be prohibited. *Calder v. Bull*, 3 U.S. at 390.[25]

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[23] Justice Chase observed that the prohibition against *ex post facto* legislation arose, in large part, as a reaction to past excesses of Parliament. *Calder*, 3 U.S. at 388. Early in the opinion, he discussed several specific acts of Parliament that he viewed to be particularly onerous and notorious, including: (1) the case of the Earl of Strafford in 1641 (declaring an act to be a crime, which was innocent when done); (2) the cases of Lord Clarendon in 1669 and the Bishop of Atterbury in 1723 (aggravating a crime by inflicting punishment where under prior law the party was not liable for any punishment); (3) the Coventry Act of 1670 (inflicting greater punishment than that permitted under the prior law); and (4) the case of Sir John Fenwick in 1696 (altering the legal rules of evidence to receive less evidence than the law required at the time of the commission of the offence). *Id.* at 388-89. These examples of parliamentary abuses are reflected in Justice Chase's list of legislative acts prohibited by the *ex post facto* clause. *Id.* at 390. But, far from serving as an exhaustive recitation of prohibited acts, the list only insured that certain specific and widely known excesses of Parliament would be included among those acts prohibited under the constitutional prohibition.

[24] As this Court observed in *Kring v. Missouri*, 107 U.S. 221, 228 (1883), "it is not to be supposed that the opinion in [*Calder v. Bull*] undertook to define, by way of exclusion, all the cases to which the constitutional provision would be applicable."

[25] That same understanding of the clause's breadth was reflected in a contemporaneous decision of the federal circuit court, in which Circuit Justice Washington noted that the clause prohibits retroactive application of any law "which, in relation to the offence, or its consequences, alters the situation of a party, to his disadvantage." *United States v. Hall*, 26 F. Cas. 84 (D. Pa. 1809) (No. 15,285), *aff'd*, 10 U.S. (6 Cranch) 171 (1810).

Since *Calder* the Court has struggled to distinguish permissible from prohibited retroactive legislation. Rather than adopt a narrow, mechanistic formula, the Court has repeatedly opted for a more open-ended, pragmatic approach.[26] That approach has been necessitated both by the myriad of legislative enactments that are possible, and by the fact that many oppressive and impermissible statutes take a "seemingly procedural form." *Miller v. Florida*, 482 U.S. at 433. As Justice Stone long ago observed for a unanimous Court: "Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree." *Beazell v. Ohio*, 269 U.S. 163, 171 (1925).

Guidance in drawing that distinction is found in two cases, decided by the same Court within one month of each other, dealing with seemingly procedural changes, and reaching opposite results. In both *Thompson v. Missouri*, 171 U.S. 380, 383-86 (May 31, 1898) and *Thompson v. Utah*, 170 U.S. 343, 351-52 (April 25, 1898), the Court recognized that no criminal defendant has the right "to be tried in the exact mode, in all respects, that may be prescribed for the trial of criminal cases at the time of the commission of the offence. . . ."[27] In both cases the Court also observed that the *ex post facto* clause

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[26] *See, e.g., Beazell v. Ohio*, 269 U.S. 163, 170 (1925) (*ex post facto* clause proscribes changes in procedure which "operate to deny to the accused a defense available under the laws in force at the time of the commission of his offense, or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition"). *See also Kring v. Missouri*, 107 U.S. at 228-32; *Mallett v. North Carolina*, 181 U.S. 589, 594-95 (1901).

[27] *Thompson v. Missouri*, 171 U.S. at 386; *Thompson v. Utah*, 170 U.S. at 351.

does not prohibit legislative "[r]emedies" which alter the "mere modes of procedure" applicable at trial.[28]

At the same time, the Court endorsed a broad view of the clause's protection, holding that it prohibits retroactive application of any law that "alters the situation of the accused to his disadvantage," or "materially impairs" his rights under the law existing at the time of the crime, or "dispense[s] with any of those substantial protections with which the existing law surrounds the person accused of crime."[29] Thus, where the change in law did no more than regulate "the mode in which the facts constituting guilt may be placed before the jury,"[30] and did so in an evenhanded manner, without "giv[ing] the prosecution any right that was denied to the accused,"[31] retroactive application of the statute was permitted. By contrast, where the change in law benefitted only the prosecution at the expense of the accused—by reducing the number of jurors needed to convict—the same Court found that retroactive application of such a statute violated the clause.[32]

Consistent with this history, the Court in its most recent *ex post facto* decisions has continued to take a flexible approach. It has articulated a two-part test to determine whether a law falls within the *ex post facto* pro-

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[28] *Thompson v. Missouri*, 171 U.S. at 386; *Thompson v. Utah*, 170 U.S. at 351.

[29] *Thompson v. Missouri*, 171 U.S. at 386 (citations omitted); *Thompson v. Utah*, 170 U.S. at 351-52 (citations omitted).

[30] *Thompson v. Missouri*, 171 U.S. at 386.

[31] *Id.* at 387.

[32] *Thompson v. Utah*, 170 U.S. at 352-53. Moreover, the Court observed that if the state were permitted retroactively to reduce the number of jurors from 12 to 8, "it could just as well have prescribed a jury of four or two, and, perhaps, have dispensed altogether with a jury, and provided for a trial before a single judge." *Id.* at 353.

hibition: "first, the law 'must be retrospective, that is, it must apply to events occurring before its enactment'; and second, 'it must disadvantage the offender affected by it.'" *Miller v. Florida*, 482 U.S. at 430 (quoting *Weaver v. Graham*, 450 U.S. 24, 29 (1981)). Shunning a rigid, restrictive test, the Court reaffirmed the principle that changes in procedure that materially impair the rights of the accused violate the *ex post facto* clause. It noted that while the distinction between substance and procedure might sometimes "prove elusive," a "change in the law that alters a substantial right can be *ex post facto* 'even if the statute takes a seemingly procedural form.'" *Id.* at 433 (quoting *Weaver v. Graham*, 450 U.S. at 29 n.12).[33]

B. This Court and the Lower Courts Have Repeatedly Held That New Laws of Criminal Procedure Cannot Be Applied Retroactively If They Cause Substantial, Demonstrable Prejudice to the Defendant.

The decisions of this Court and the lower courts applying the *ex post facto* clause cover a spectrum ranging from purely substantive to purely procedural laws. At one end are those decisions barring retroactive application of statutes that materially impair the rights of the defendant either by criminalizing conduct that was innocent when committed, or by increasing the penalty ascribed to criminal conduct.[34] These decisions rest on the principle that it is manifestly unfair to punish those who have had no fair warning of the consequences of their actions at the time they were committed. Closely related, though less egregious, are those statutes that retroactively alter the range of permissible penalties, without increasing the maximum. These statutes are harsh and oppressive, and hence prohibited, not because the defendant lacked fair warning that he might receive the maximum

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[33] *See also Dobbert v. Florida*, 432 U.S. 282, 293 (1977).

[34] *See Weaver v. Graham*, 450 U.S. 24 (1981); *In re Medley*, 134 U.S. 160 (1890).

sentence, but rather because the new law increases the likelihood that the defendant in fact will receive that penalty.[35]

At the other end of the spectrum are purely procedural statutes which alter the fact-finding process, or the courts where that process occurs, in ways that are evenhanded and neutral vis-a-vis the defendant. Thus, consistent with the principles discussed in *Thompson v. Missouri*, the Court has upheld laws that retroactively changed venue rules,[36] broadened the class of witnesses permitted to testify on behalf of either party,[37] reduced the number of judges assigned to hear appeals,[38] granted the government the right to appeal (and thereby correct) the erroneous decision of an intermediate appellate court,[39] and modified the procedures for administering the death penalty to add constitutionally required protections for the defendant.[40]

Between these extremes are a series of decisions barring retroactive application of laws that—like the one at issue here—have a procedural form, but a substantive impact. They include not only *Thompson v. Utah*, but also this Court's seminal decision barring the retroactive abrogation of a state law rule treating conviction of a lesser-included offense as acquittal of the greater offense. *Kring v. Missouri*, 107 U.S. 221 (1883). More recently, this Court held that a statute which retroactively "foreclosed [the defendant's] right to challenge the imposition of a sentence" by eliminating his prior right of appeal

[35] *See Lindsey v. Washington*, 301 U.S. 397, 401-02 (1937). *See also Miller v. Florida*, 482 U.S. at 432-33; *Kring v. Missouri*, 107 U.S. at 224.

[36] *Gut v. State*, 76 U.S. 35 (1870).

[37] *Hopt v. Utah*, 110 U.S. 574 (1884).

[38] *Duncan v. Missouri*, 152 U.S. 377, 382-83 (1894) (dicta).

[39] *Mallett v. North Carolina*, 181 U.S. at 597.

[40] *Dobbert v. Florida*, 432 U.S. at 296-97.

"substantially disadvantaged" the defendant in violation of the clause.[41]

Each of these statutes did far more than "simply alter[] the methods employed" in the fact-finding process to determine guilt or punishment.[42] None of them was neutral or evenhanded as between the prosecution and defendant; and they did not simply add another protective layer of review to improve the reliability and integrity of the fact-finding process.[43] Rather, their entire purpose and effect was to strip from the defendant a protection available at the time of the offense and thus alter the balance to the advantage of the state.

Consistent with these principles, lower courts have also repeatedly barred retrospective laws that, though seemingly procedural, had a substantial adverse impact on the defendant. These include laws which retroactively extend the statute of limitations for criminal offenses once the original statutory period has lapsed;[44] eliminate the

[41] *Miller v. Florida*, 482 U.S. at 432. To be sure, the Florida statute at issue in *Miller* "disadvantaged" the defendant in other respects as well: it altered the "presumptive sentence range" applicable to the offense and relieved the trial judge of any responsibility for "provid[ing] any reasons, convincing or otherwise," for imposing a sentence within the newly-prescribed range. *Id.* at 432-33. At least one lower court, however, has suggested that the denial of the defendant's right of appeal, standing alone, would be sufficient to violate the clause. *See Rubino v. Lynaugh*, 845 F.2d 1266, 1279 (5th Cir. 1988) (King, J., concurring). *Cf. Ex parte Abahosh*, 561 S.W.2d 202, 203 (Tex. Crim. App. 1978) (denial of defendant's automatic right of appeal violated state *ex post facto* clause).

[42] *See Dobbert v. Florida*, 432 U.S. at 293-94.

[43] *See, e.g., Dobbert*, 432 U.S. at 293-94 (no *ex post facto* violation in allowing retroactive legislation that accords capital defendant additional levels of sentencing review); *Mallett v. North Carolina*, 181 U.S. 589 (1901) (no *ex post facto* violation in allowing government right to appeal erroneous ruling, thereby enhancing the accuracy and reliability of appellate review).

[44] *See Moore v. State*, 43 N.J.L. 203, 222-23 (1881); *Sobiek v. Superior Court*, 28 Cal. App. 3d 846, 106 Cal. Rptr. 516, 518

requirement that prosecutions commence by grand jury indictment, and instead, allow them to proceed by information;[45] abolish the defendant's right of appeal;[46] or shift to the defendant the burden of proving the defense of insanity.[47]

In addition to these decisions, it is not hard to imagine other "procedural" changes which are permissible if applied prospectively, but which the *ex post facto* clause would foreclose if applied retroactively. These might include, for example, laws that abolish a state-created requirement of conviction by a unanimous verdict in favor of conviction by a simple majority; allow the state to seek resentencing in capital cases in which the sentencing jury has deadlocked over penalty, when the law in place at the time of the offense mandated an automatic sentence of life imprisonment under such circumstances;[48]

(1972); *State v. Edwards*, 701 P.2d 508, 512 (Wash. 1985) (en banc). Other courts have taken the same position, albeit in dicta. *See Falter v. United States*, 23 F.2d 420, 425-26 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928); *United States ex rel. Massarella v. Elrod*, 682 F.2d 688, 689 (7th Cir. 1982), *cert. denied*, 460 U.S. 1037 (1983); *Clements v. United States*, 266 F.2d 397, 399 & n.4 (9th Cir.), *cert. denied*, 359 U.S. 985 (1959); *United States v. Fraidin*, 63 F. Supp. 271, 279 (D. Md. 1945).

[45] *Mafnas v. Government of Guam*, 228 F.2d 283, 286 (9th Cir. 1955).

[46] *Cf. Ex parte Abahosh*, 561 S.W.2d at 203 (retroactive elimination of defendant's automatic right to appeal conviction, adopted between time defendant pled guilty to crime and was sentenced by the court, violated Texas constitutional protection against *ex post facto* laws). *See also Camp v. State*, 200 S.E. 126 (Ga. 1938) (elimination of the defendant's prior right to have punishment administered by jury, rather than by the court, violates clause); *Hurt v. State*, 199 S.E. 801 (Ga. 1938) (same).

[47] *United States v. Kowal*, 596 F. Supp. 375, 378-79 (D. Conn. 1984).

[48] In many jurisdictions, a capital defendant is entitled to an automatic sentence of life imprisonment if the sentencing jury is

or eliminate the defendant's statutory right to a new trial by replacing (shortly after the defendant's conviction) a statute mandating a new trial upon proof that the prosecution destroyed exculpatory evidence for any reason, with one which requires the defendant to prove bad faith.

Each of these laws is intended to and does operate solely to the detriment of the defendant. Each law represents a legislative judgment that the balance between the prosecution and defendant should be altered to enhance the state's opportunity to penalize unlawful conduct. That objective is constitutionally permissible, and may even be laudable, when applied to future conduct. But it is "harsh and arbitrary"[49] when applied retrospectively to conduct that occurred prior to the legislative enactment.

The arbitrary character of such legislation is measurably heightened when the law is applied, as in this case, not simply to events that occurred prior to enactment, but to defendants who were tried and convicted (albeit improperly) under the prior law.[50] A cornerstone

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unable to reach a unanimous verdict. *See, e.g.*, Va. Code § 19.2-264.4(E) (1983). Assume a jury is unable to reach a unanimous verdict on punishment, and is excused by the court, which then sets sentencing for one month later. Between the time the jury is excused and the sentencing date, however, the legislature amends the capital statute to permit the court to convene a second jury for resentencing—thus abolishing the defendant's right under the earlier statute to a sentence of life imprisonment upon return of a split verdict. Under petitioner's analysis of the *ex post facto* clause, the state would be permitted to reconvene a new jury, and seek to secure a death sentence when such sentence was prohibited under prior law.

[49] *Beazell v. Ohio*, 269 U.S. at 170.

[50] *Cf. Dobbert v. Florida*, 432 U.S. at 301 (in rejecting defendant's equal protection challenge to Florida's revised sentencing law, the Court put some weight on the fact that the state "had to draw the line at some point between those whose cases had progressed suffi-

of *ex post facto* jurisprudence from the beginning has been the notion that the clause prohibits the retroactive elimination of "vested rights" held by the defendant."[1] Although the reason why that factor is significant has never been fully explained, presumably it turns at least in part on the notion that a vested right is demonstrable, not conjectural; and the effect of its deprivation can be determined without speculation. At a minimum, this principle should mean that the defendant has a "vested right" to have his case judged by the substantive features of the law in place at the time of his offense, indictment, trial and appeal; and that the state is foreclosed from applying to his case a new, more onerous statutory scheme—adopted long after the crime and conviction—that deprives the defendant of a substantial protection afforded by the prior law. Yet that is precisely what occurred here.

In sum, the *ex post facto* test applied by the courts for nearly two centuries is far broader and more flexible than the one petitioner advocates. In addition to being retrospective, most *ex post facto* laws share two related characteristics. First, they alter the balance solely to the benefit of the state and against the defendant. Unlike changes affecting the way the evidence may be presented or the identity of the courts that receive and review it—factors which may inure to the benefit of either side—an *ex post facto* law is one-sided, not evenhanded. Second, *ex post facto* laws usually have a direct, substantial impact on the defendant, which can be demonstrated without resort to speculation. Laws denying a defendant

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ciently far in the legal process as to be governed solely by the old statute . . . and those whose cases involved acts which could properly be subject to punishment under the new statute").

[51] *See, e.g., Calder v. Bull*, 3 U.S. at 390; *Hopt v. Utah*, 110 U.S. at 590; *Thompson v. Missouri*, 171 U.S. at 385-86. Although the Court has recently made clear that the clause also protects rights that have not "vested," *see Weaver v. Graham*, 450 U.S. at 29-30, those rights that have "vested" are *a fortiori* protected.

repose after a statute of limitations period has lapsed, or depriving a defendant of an absolute defense to punishment, or stripping the defendant of a right of appeal, will have a far greater, more tangible impact than changes which alter the rules of evidence after the offense but before the trial. For the same reason, fundamental changes in the law enacted after the defendant's trial (but before a retrial) should be far more difficult to justify, since their effect on the defendant's rights is clearly measurable and beyond dispute.

C. The Revised Texas Statute Caused Substantial Demonstrable Prejudice to Youngblood, Because It Retroactively Deprived Him of His Right to Liberty and the Presumption of Innocence.

The court below held that retroactive application of Article 37.10(b) deprived Youngblood of a substantial right, and thus violated the *ex post facto* clause. As the court correctly noted, this right was anchored in Texas law: "[I]t was the law of Texas that a verdict of the type rendered in this case was void *ab initio* and its imposition entitled the accused to a new trial. . . . Prior Texas law made it impossible to deprive defendants such as Youngblood of their liberty without affording them a new trial." *Youngblood v. Lynaugh*, 882 F.2d 956, 960 (5th Cir.), *cert. granted*, 110 S. Ct. 560 (1989). Moreover, the retroactive change in the law did not merely provide the appellate court with "an additional remedy to correct an unauthorized verdict," as the United States now contends.[52] Rather, the change stripped the defendant of his absolute, preexisting statutory right to an order vacating the jury's judgment of conviction and prohibiting imposition of any punishment. That right was plainly substantial not only because it carried with it the possibility of a lesser punishment (or none at all) in the event of a retrial; but even more significantly, it gave the

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[52] Brief of the United States at 15.

defendant his liberty.[53] The retroactive elimination of that right should be impermissible under any circumstances. It was particularly egregious in this instance, where it occurred long after the defendant had been tried to a final (albeit erroneous) judgment under the earlier law.

Contrary to petitioner's contentions, the statutory rights taken from Youngblood three years after trial and sentencing were not a "quirk" or "fortuity with no basis in law or logic."[54] As set forth above, it was the consistent and unwavering judgment of the Texas legislature and judiciary for well over a century that the defendant had an absolute right to an error-free jury verdict on both guilt and punishment. That right was zealously enforced, with courts repeatedly invalidating the entire product of jury deliberations whenever the jury erred by assessing an unauthorized punishment. Although petitioner appears to question the wisdom of that policy, there is no doubt that it represented the considered judgment of the Texas legislature for over 125 years.

Petitioner and the United States are equally wrong about the significance of these rights under federal law.

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[53] It is difficult to overstate the benefits to the defendant of the statutory scheme in place at the time of Youngblood's trial. Both petitioner and even the Court of Appeals subtly minimize the significance of these benefits by suggesting that they consist of the " 'right' to an entire new trial." Petitioner's Brief at 12; *Youngblood v. Lynaugh*, 882 F.2d at 960. In fact, it is the *state*, not the defendant, which receives that right. The defendant receives the far more precious right to have the entire verdict of guilt rendered void at its inception. That determination necessarily entails the right to receive the presumption of innocence, to the expunging of any evidence of a conviction, and to absolute freedom from the imposition of punishment unless and until the state opts to exercise its right of retrial and then succeeds in securing a valid verdict.

[54] Petition for Writ of Certiorari at 13.

Taken together, their arguments rest on three fundamental errors.

First, they attack the validity of *Thompson v. Utah*, upon which the court below expressly relied.[55] It is true, as the United States asserts, that the *Thompson* Court believed that the Sixth Amendment mandated a jury of twelve, and that subsequent decisions have rejected that notion. But that fact in no way undermines the validity of *Thompson*. The *ex post facto* clause would add nothing to the Constitution if the only changes it proscribed were ones that abolished other constitutional protections. In fact, most of the rights which this Court has found to be protected by the *ex post facto* clause are statutory creations which the legislature is free to abolish—although not retroactively.[56]

Petitioner's attack on *Thompson v. Utah* is a critical feature of its argument, because if *Thompson* survives, the decision below must stand. If the defendant's right to the benefit of a twelve-person jury is "substantial," the right to automatic vacatur of a conviction and life sentence is even more so. It is of crucial importance to note, however, that the converse is not true. Even if the Court were to overrule *Thompson*—a result that no party has requested—the decision below should still be upheld.

Thompson stands at the far limits of those cases involving procedural changes with a substantive impact.

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[55] *See, e.g.*, Petitioner's Brief at 22 (*Thompson* is of "questionable precedential value"); Brief of the United States at 10 (*Thompson* arose out of "unusual circumstances" and "should not be given broad application to modern *ex post facto* claims").

[56] *See, e.g., Miller v. Florida*, 482 U.S. at 424-25 (retroactive application of revised sentencing guidelines); *Weaver v. Graham*, 450 U.S. at 30 & n.13 (retroactive abolition of statutory "gain time"). Petitioner's suggestion that the *ex post facto* clause only prohibits retroactive alterations of other constitutional rights has never been endorsed by any court, and was specifically rejected in *Rubino v. Lynaugh*, 845 F.2d at 1272.

The Court in *Thompson* correctly perceived that the larger a criminal jury, the greater the burden on the prosecution of convincing every juror to convict beyond a reasonable doubt. Arguably, however, the reduction in jury size could be regarded as evenhanded, simply requiring each side to convince an equal number of jurors. Here, by contrast, the prosecution was given a new statutory right that materially enhanced its position without any corresponding benefit to the defendant. In the face of a century of precedent to the contrary, the prosecution was allowed to validate and reform an otherwise invalid verdict, thereby depriving the defendant of the certainty of automatic vacatur and liberty.

Second, in an argument not mentioned by petitioner, the United States contends that *Mallett v. North Carolina*, 181 U.S. 589 (1901), controls the instant case. In *Mallett*, the petitioners had been convicted and sentenced to imprisonment by a North Carolina trial court; they appealed to the Superior Court, which reversed the conviction. At the time the defendants committed their offenses, the state was precluded from appealing adverse determinations of the Superior Court; but by the time the defendants had perfected their appeal to the Superior Court, that law had been changed to permit the state to appeal judgments of the Superior Court to the state Supreme Court. The state exercised that right and appealed from the judgment of the Superior Court. The North Carolina Supreme Court reversed the Superior Court, and remanded the case to the trial court with directions to impose sentence. *Id.* at 590. This Court held that this change in the appellate process—established before the defendants had perfected their initial appeal from the verdict—was consistent with the *ex post facto* clause.

In seeking to analogize *Mallett* to the case at bar, the United States suggests that in both instances, the prior law gave the defendant "a windfall when certain types of error occurred." Brief of the United States at 17. This argument has the facts exactly backwards. To be

sure, the defendants in *Mallett* were seeking a "windfall"; the trial court in *Mallett* had rendered a valid verdict, and the defendants wanted an order mandating that the erroneous decision of the state's intermediate appellate court, reversing that verdict, be frozen in place and given the force of law. Here the reverse is true. No one asserts or could assert that Youngblood's original conviction was valid; it is uncontested that, under prior law, such jury error mandated a new trial. Here it is the *state*, not Youngblood, that seeks to obtain a windfall by invoking a new law which allows it to do what had earlier been expressly prohibited—enforce a conviction that was otherwise void.[57] Put differently, in *Mallett* the defendant asserted that he was entitled to obtain the benefit of an erroneous judgment; in *Youngblood*, it is the state which seeks to obtain the benefit (*i.e.*, a conviction and sentence) from a judgment that was void as a matter of law when rendered.[58]

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[57] *Mallett* is, in any event, distinguishable on other grounds. Allowing the prosecution a right of appeal from an erroneous judgment does no more than put both sides on an even plateau. In addition, the timing of the change in law seems to have played a crucial role in the Court's reasoning in *Mallett*. The Court was careful to note that the change in procedure occurred after the defendants had been convicted in the trial court, but before they had perfected their appeal. *Mallett*, 181 U.S. at 597. In invoking the benefits and opportunities of the appellate process, defendants may fairly be required to accept all the rules integral to the process in place at the time, including the rule allowing the prosecution the right to appeal to the state's highest court an erroneous determination in favor of the defendant by the intermediate court.

[58] Although petitioner and the United States both cite *Dobbert v. Florida*, that case is plainly distinguishable as well. The defendant in *Dobbert* committed his offense at a time when Florida had in place a capital sentencing statute which was manifestly unconstitutional and disadvantageous to defendants. By the time of Dobbert's trial, Florida had replaced its capital statute with one that provided the defendant a full panoply of procedural protections. Although Dobbert was sentenced to death under that statute, he claimed that the result might have been different had his case been judged under the old, draconian law. That argument stood the law

Finally, the United States asserts that policy concerns should lead to a finding against the defendant. The Government conjectures that the prior law, affording the defendant a new trial upon an unauthorized jury verdict, gave the defendant a "dangerous disincentive to correct trial error. . . ." Brief of the United States at 14 n.6. It is of course the legislature, not the judiciary, which is entrusted with responsibility for weighing such policies. But even if it were otherwise, this metaphysical "danger" is slight when compared to the potential for abuse that exists when the state is allowed retroactively to abolish the rights of defendants upon the occurrence or discovery of trial error. Under the *ex post facto* regime proposed by the petitioner, the state would have an unqualified incentive to delay correcting trial error (or even to conceal such error) pending adoption of such legislation.[59]

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on its head: No defendant can properly claim a substantial right to be sentenced under an unconstitutional statute. *See Dobbert*, 432 U.S. at 295. Moreover, since Dobbert had never been tried under the old statute, his prediction about how the jury would have voted if that law had been in place was rank speculation. *Id.* at 294.

By contrast, the statute in place at the time of Youngblood's offense, trial and conviction was unquestionably constitutional and was designed to provide defendants with broad, "procedural" protections. Moreover, there is no need to speculate about the result if Youngblood's case were judged under that statute: his verdict of guilt and sentence of life imprisonment would be absolutely void. absolutely void.

[59] That danger is by no means conjectural. Indeed, in *Evans v. Thompson*, the state delayed conceding trial error for over two years—confessing error only after the legislature had passed emergency legislation permitting capital resentencing. 881 F.2d at 119. *See also State v. Norton*, 675 P.2d 577, 591 (Utah 1983), *cert. denied*, 466 U.S. 942 (1984) (Stewart, J., concurring and dissenting) (state files seven successive motions for continuance to file appellate brief, prolonging appeal for over one year, and thus bringing case within new statute permitting, for first time, capital resentencing).

II. EVEN IF THE STANDARD URGED BY PETITIONER AND THE UNITED STATES WERE ADOPTED, THE DECISION BELOW WOULD STILL BE CORRECT.

Petitioner and the United States urge the Court to turn the clock back 175 years and adopt, as the definition of *all* "substantial rights" protected by the *ex post facto* clause, selected portions from the dicta of one Justice in *Calder v. Bull*. In doing so, however, they acknowledge that even under their proposed test the state violates the *ex post facto* clause when it seeks retroactively to eliminate any defense previously available to the defendant.[60] That is precisely what occurred here.

There cannot be any doubt that the *ex post facto* clause rigidly proscribes any effort to impair an available defense. This Court reiterated that principle in *Dobbert v. Florida* stating that "any statute which . . . deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*." *Dobbert*, 432 U.S. at 292 (citations omitted).

The seminal decision on this point is *Kring v. Missouri*, 107 U.S. 221 (1883). In *Kring*, the defendant, charged with capital murder, pleaded guilty to second degree murder. He appealed from his sentence, arguing that it exceeded the terms set in the plea agreement. At the time of Kring's offense, the Missouri Constitution provided that a guilty plea to a lesser-included offense operated as an acquittal of the greater offense; by the time of Kring's plea, however, this state constitutional provision had been repealed. Following the appeal, in which Kring's sentence and conviction for second degree murder were vacated, Missouri retried Kring for the greater offense—first degree murder. Kring was convicted of that offense and sentenced to death.

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[60] *See* Petitioner's Brief at 7; Brief of the United States at 7.

On appeal to this Court, Kring claimed that he was entitled to the benefit of Missouri's repealed law barring prosecution for the greater offense, because that provision had been in force at the time of the offense. Kring claimed that the state had violated the *ex post facto* clause when it denied him the benefit of the prior law and subjected him again to the death penalty. The state countered that the change in Missouri law was "simply . . . a matter of procedure." 107 U.S. at 224. This Court, however, rejected that argument, observing that "it is obvious that a law which is one of procedure may be obnoxious as an *ex post facto* law . . . ." *Id.* at 232. The Court noted that retroactive application of Missouri's law to Kring, which meant "the difference between life and death," *id.* at 224, violated the clause because it deprived him of an absolute defense to being re-exposed to the death penalty. *See id.* at 229, 234.[61]

Although there are few decisions construing this aspect of the *ex post facto* clause, all of them support respondent's position. As already noted, courts have uniformly prohibited retroactive extensions of statutes of limitations once the original period specified has lapsed. *See* discussion at page 17 & n.44, above. To do otherwise would deny the defendant a defense otherwise available to the imposition of punishment. An analogous situation arose in *State v. Keith*, 63 N.C. 140 (1869),[62] where an act of

[61] The United States does not question the validity of *Kring* and agrees that it stands for the proposition that the *ex post facto* clause prohibits the "retrospective removal of defenses." Brief of the United States at 11 n.5. Petitioner's attempt to find a "decisive distinction" between *Kring* and this case is based on a misreading of *Kring*'s facts. Contrary to petitioner's assertion (Brief at 22), the Missouri constitutional provision invoked by Kring had been repealed four years *before* Kring's plea. 107 U.S. at 222-24; *id.* at 236 (Matthews, J., dissenting). Moreover, although petitioner asserts that *Kring*'s validity is "questionable" (Brief at 21), this Court has recently cited its *ex post facto* principle with approval. *See Weaver v. Graham*, 450 U.S. at 29.

[62] Cited with approval in *Kring*, 107 U.S. at 231.

amnesty was passed after the defendant had committed his crime. Before the defendant was prosecuted, however, the amnesty act was repealed, and prosecution was instituted. The Supreme Court of North Carolina found application of the ordinance repealing the amnesty act to be "substantially an *ex post facto* law," since it "took away from the prisoner his vested right to immunity." *State v. Keith*, 63 N.C. at 153-54.

Retroactive application of Article 37.10(b) deprived Youngblood of an absolute defense to imposition of punishment arising out of a void, and entirely invalid verdict. Indeed, prior to passage of the statute at issue, any attempt to impose punishment based upon the invalid verdict, or to modify the defective judgment, was similarly void as a matter of law. *Ex parte Spaulding*, 687 S.W.2d at 743.[63] Where, as here, the defendant becomes, in essence, "dispunishable"[64] under application of prior law, retroactive deprivation of such a defense to punish-

[63] Petitioner suggests that since Youngblood was apprised of the criminal sanctions to which he exposed himself by his actions, such "fair warning" precludes any *ex post facto* challenges to the statute in question. *See* Petitioner's Brief at 13-14. Although this Court has recognized that a principal purpose of the *ex post facto* clause is to provide the defendant with "fair notice," fair notice is not the touchstone of all *ex post facto* jurisprudence. For instance, in the statute of limitations cases discussed at page 17 & n.44, above, the accused were "on notice" of the criminal sanctions to which they exposed themselves by virtue of their actions. Nonetheless, without exception, the courts have disallowed prosecutions undertaken pursuant to extended statutes enacted after the original limitations period had lapsed—even though the defendant had "fair warning" from the outset of the penalty associated with the crime. Similarly, this Court found an *ex post facto* violation in *Kring*, even though the offense he committed always carried the possibility of a death sentence. Indeed, in an earlier proceeding, before he pled guilty to second degree murder, Kring had actually been sentenced to hang for the offense. *See Kring v. Missouri*, 107 U.S. at 221-22; *id.* at 236 (Matthews, J., dissenting).

[64] *See Moore v. State*, 43 N.J.L. at 221.

ment clearly satisfies the standards articulated in *Calder v. Bull* and proposed by petitioner.[65]

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

ARTHUR F. MATHEWS *
THOMAS F. CONNELL
MARK D. CAHN
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000
Counsel for Amicus Curiae

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* Counsel of Record

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[65] Such a defense to imposition of punishment is, of course, even more persuasive where application of the original statute would not simply have vacated the verdict, as in this case, but would also have dictated the final result. Such is the case in *Evans v. Thompson*, where the original statute would have prohibited Virginia from resentencing Evans to death, and required imposition of an automatic sentence of life imprisonment.